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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 319.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

JACOB ANDERSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

FILED AUGUST 2, 1912.

(23,319)

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1 JACOB ANDERSON, Plaintiff,
vs.
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Caption.

Suit for Damages, Injury to Personal Property.

Pleas before Hon. J. T. Cowling, Judge of the 9th Circuit, and a Jury, Little River Circuit Court, on the 5th day of January, 1912.

2 *Claim Filed Before Justice of the Peace.*

One Poney Mare. Kil-d By Kansas City Sourthern Rail Way Co. Valued At Fifty Dollars $50.00. Kil-d April the 29th, 1911, Near Mile Post 364, State of Arkansas, County of Little River.

Be it remembered that on this the 29th Day of April 1911 Before me J. W. Pipkin J. P. in and for the said County Little River Personally Came Jacob Anderson Who Being By me Duley sworn Deposes And Says that he Re-sides in Wilton, Ark., Little River County, Ark., that the Attached Account Against Kansas City Southern Railway Co., is Just and Correct that the Amount of $50.00 Fiftey Dollars

JACOB ANDERSON.

Subscribed And sworn to Before me 18 day of August 1911.
J. W. PIPKIN, *J. P.*

3 LITTLE RIVER COUNTY,
State of Arkansas, Cleveland Township:

JACOB ANDERSON, Plaintiff,
vs.
KANSAS CITY SOUTHERN RAILWAY CO., Defendant.

Judgment in J. P. Court.

On the 18 Day of August the Plaintiff Files before me his Cuase of Action Against the Defendant For $50.00 Dol-as As Follows to wit:

Jacob Anderson Plaintiff Having Filed before me his complaint And Af-idavit Against the Defendant Kansas City Sourthern Rail-Way Co. For the sum of $50.00 Fiftey Dollars thereupon A writ of summons was thereupon issued Against the Defendant And Returnable on the 31 Day of August 1911 10 -)clock A. M. And Delivered to the Constable of Cleveland township.

on this the 31 Day of August 1911 the Return Day of the sum-

mons Which Is Returned Duluy served Having Waited three Hours For Defendant He came not But Made Default this Action is Founded upon A Complaint Filed in this office it is therefore By Me Considered And Adjudged that the Plaintiff Have And Recover of the Defendant the sum of $50.00 Fifty Dolla-s for his Debt And the sum of $1.00 one Dolla-s Enterest thereon total $51.00 Dolla-s And that said sum Bear 6 Per cent Per Annum And All of his Cost By him in this suit Expended.

Justice Cost	$2.80
Constable "	2.30
Witnesses "	2.50

Given under mi hand this 31 Day of August 1911.

J. W. PIPKIN, *J. P.*

4 STATE OF ARKANSAS,
County of Little River, Cleveland Township:

Certificate of Justice of the Peace.

JACOB ANDERSON, Plaintiff,
vs.
KANSAS CITY SOUTHERN RAILWAY CO., Defendant.

Here Copy Judgment.

I, J. W. Pipkin a Justice of the Peace Within And For the township of Cleveland in the County of Little River Do hereby Certify that the foregoing is A true Complete And Perfect transcript of the Judgment upon My Docket Rendered By me on the 31 Day of August, 1911 in A Case Wherein Jacob Anderson Plaintiff and Kansas City Southern Railway Co., Defendant.

Given under mi hand this 5 Day of Sept. 1911.

J. W. PIPKIN, *J. P.*

5 Before J. W. Pipkin, Justice of the Peace, Cleveland Township, Little River River County, Arkansas.

JACOB ANDERSON, Plaintiff,
vs.
THE KANSAS CITY SOUTHERN RAILWAY CO., Defendant.

Affidavit for Appeal.

Now comes the deefndant, The Kansas City Southern Railway Company, and moves the Court to grant it an appeal from the judgment of this court heretofore rendered in this cause to the Little River Circuit Court.

Said defendant states that said appeal is not taken for the purpose of delay, but that justice may be done it.

READ & McDONOUGH,
Attorneys for Defendant.

STATE OF ARKANSAS,
County of Sebastian:

Affiant, Jas. F. Reid, on oath states that he is one of the attorneys for The Kansas City Southern Railway Company, the defendant in the above entitled cause; that he is duly authorized to make this affidavit, and that said defendant takes this appeal not for the purpose of delay, but that justice may be done it.

JAS. F. REID.

Subscribed and sworn to before me this 2nd day of September, 1911.

[SEAL.] HARRY P. DAILY,
Notary Public.

My commission expires July 14th, 1914.

6 Before J. W. Pipkin, Justice of the Peace, Cleveland Township, Little River County, Arkansas.

JACOB ANDERSON, Plaintiff,
vs.
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Bond for Appeal.

We, the undersigned, The K. C. S. Ry. Co. and National Surety Company, acknowledge ourselves indebted to Jacob Anderson, the plaintiff herein, in the sum of One Hundred and Fifty Dollars ($150.00) to be void upon this condition:

Whereas, the said The Kansas City Southern Railway Company has appealed from the judgment of J. W. Pipkin a Justice of the Peace, in an action between Jacob Anderson, plaintiff, and The Kansas City Southern Railway Company, defendant; now, if said The Kansas City Southern Railway Company shall prosecute its appeal with due diligence to a decision, and if on such appeal the judgment of the Justice be affirmed, or if on the trial anew in the Circuit Court judgment be given against the appellant, it shall satisfy the judgment, or if its appeal be dismissed, it shall pay the judgment of the Justice, together with the costs of the appeal, this bond shall be void.

This 2nd day of September, 1911.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By READ & McDONOUGH,
NATIONAL SURETY COMPANY,
By JAS. F. READ, *Att'y in Fact.*

7 *Appeal Filed in Circuit Court.*

Appeal Filed in Circuit Court September 8th, 1911.

8 In the Little River Circuit Court.

JACOB ANDERSON, Plaintiff,
vs.
KANSAS CITY SOUTHERN RY. CO., Defendant.

Amendment to Complaint.

Comes the plaintiff, Jacob Anderson, and ask- to amend his complaint herein and for cause states:

That said defendant wholly failed and refused to pay and settle for the killing of one pony mare for more than thirty days after demand had been made therefor.

Wherefore he prays for the Statutory Penalty provided by the Acts of 1907 of the Statutes of the State of Arkansas, page 61, and a reasonable attorneys' fee.

Wherefore, plaintiff prays judgment for double the value of the said pony mare, his attorneys' fee, his cost and other relief.

STEEL, LAKE & HEAD,
Attorneys for Plaintiff.

Filed in Open Court January 3rd, 1912.

9 In the Little River Circuit Court.

Answer of Defendant.

JACOB ANDERSON, Plaintiff,
vs.
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Answer.

Comes the defendant and for answer herein states as follows:

Defendant denies that plaintiff is the owner of the animal described in the complaint; and denies that it negligently killed said animal or damaged or injured the same; and denies that it was killed by this defendant; and denies that said animal was of the value of $50.00 or any other sum and deny that plaintiff is entitled under section 6777 of Kirby's Digest of the laws of Arkansas, and allege that the said section 6777 of Kirby's Digest and all amendments thereto and the Act of the General Assembly of Arkansas approved March 9, 1899, and the amendments thereto is void because in conflict with section one of article fourteen of the Constitution of the United States, in that said Acts of Arkansas abridge the privilege and immunities of this defendant which is a

citizen of the State of Missouri and said Acts of Arkansas deprive this defendant of its property without due process of law and deprives it of the equal protection of the laws, contrary to said section 1 of Art. 14 of the Constitution of the United States.

Premises considered defendant prays judgment for costs.

READ & McDONOUGH,
Attorneys for Defendant.

10 *Judgment.*

JACOB ANDERSON, Plaintiff,
vs.
K. C. S. RY. CO., Defendant.

This day this cause coming on to be heard, come the plaintiff, Jacob Anderson, by his attorneys, Steel, Lake & Head, and comes the defendant, The Kansas City Southern Railway Company, by Read & McDonough, its attorneys, and the plaintiff files an amendment to his complaint and the defendant amends its answer to respond thereto; thereupon both parties announce ready for trial, and this cause is submitted to a jury; whereupon comes O. L. Davis and eleven other good and lawful men, who being examined under oath touching their qualifications were found qualified and duly accepted, sworn and empannelled to try the issues in this case. And the jury having heard the evidence and argument of counsel and having received the instructions of the Court retired to consider of their verdict, and thereafter returned into open court with the following verdict, to-wit:

"We, the jury find for the plaintiff and assess his damages at Fifty Dollars. O. L. Davis, Foreman."

Thereupon the plaintiff filed a motion for judgment in double the sum awarded by the jury and for attorneys' fees and said motion coming on to be heard and being heard on the evidence, the Court is of the opinion and finds that plaintiff is entitled to a judgment for the sum of One Hundred Dollars for his damages and in addition thereto a reasonable attorneys' fee in the sum of Twenty Five Dollars.

It is therefore considered ordered and adjudged by the Court that the plaintiff, Jacob Anderson, do have and recover of and from the defendant, The Kansas City Southern Railway Com-
11 pany, the sum of One Hundred Twenty Five Dollars for his debt and damages with interest at Six per cent per annum from this date until paid and all of his costs in and about the cause expended, for all of which in due time let execution issue.

It is further ordered that this judgment be and is hereby declared to be a lien upon the roadbed, right-of-way, appurtenances, franchises, rolling stock, etc., of the defendant superior and paramount to that of all parties interested in said road in manner and form as now provided by the law of this State.

Proceedings of January 5th, 1912.

12 *Order Overruling Motion for New Trial.*

JACOB ANDERSON, Plaintiff,
vs.
K. C. S. RY. CO., Defendant.

This day comes the defendant by its attorneys, Read & McDonough, and files its motion for new trial, upon consideration the Court doth overrule said motion, to which action of the Court in so overruling its said motion the defendant excepted and asked that its exceptions be noted of record, which is done, thereupon the defendant prayed and was granted an appeal to the Supreme Court of the State of Arkansas and ninety days is given in which to prepare and file its bill of exceptions herein.

Proceedings of January 10th, 1912.

13 In the Little River Circuit Court.

JACOB ANDERSON, Plaintiff,
vs.
KANSAS CITY SOUTHERN RAILROAD CO., Defendant.

Motion for Penalty and Attorneys' Fees.

Now come the plaintiff and represents and shows to the Court that he put in his claim on or about the 1st of May, 1911, with the Kansas City Southern Railroad Company, through its regular Claim Agent at Texarkana, for $50.00 for the killing of the horse in controversy in this action, and that more than thirty days elapsed thereafter and said claim remained unpaid; that thereafter he filed his suit on or about the — day of August, 1911, before a Justice of the Peace in Little River County, Arkansas, asking damages in the sum of Fifty Dollars for the killing of said horse; that said case was appealed to the Little River Circuit Court and at this term of the Court a jury trial was had and a verdict rendered fixing the value of the horse at the time it was killed in the sum of Fifty Dollars and a verdict rendered in favor of the plaintiff for that amount; that by reason of the failure to pay said claim within thirty days after said claim was lodged with the defendant; that plaintiff has become and is entitled to receive a statutory penalty of Fifty Dollars together with a reasonable attorney's fee and moves the Court to assess such penalty and attorney's fee in accordance with the Statute in such case provided.

JACOB ANDERSON.

Subscribed and sworn to before me this the 6 day of January, 1912.

ED. JONES, *Clerk.*

Filed January 6th, 1912.

14 In the Little River Circuit Court.

Motion for New Trial.

JACOB ANDERSON, Plaintiff,
vs.
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Comes the defendant and moves the court for a new trial herein upon the following grounds, to-wit:

1.

The verdict is contrary to the law and the evidence, and is not supported by any evidence whatever.

2.

The court erred in permitting the plaintiff to file an amended complaint claiming a penalty of $50.00 and attorney's fee, as no issue of that kind was made in the Justice Court, where this case was originally brought.

To permit such an amendment is contrary to the law and raises issues in the Circuit Court which were not raised or tried in the Justice Court, and deprives this defendant of its property without due process of law, and does not give this defendant the equal protestion of the laws contrary to Section I of Article 14 of the Constatution of the United States.

3.

Because the Act of Arkansas, found in Kirby's Digest, Section 6777 and the Acts of 1907 and 1909, attempting to authorize the penalty and attorney's fee, are void because in conflict with Article I of Section 14 of the Constitution of the United States.

15 4.

Because the Act of 1907, found in the Acts of that year, of the General Assembly of Arkansas, at page 144, amending Section 6774 of Kirby's Digest, and also the Act of the General Assembly of Arkansas, found in the Acts of 1909, page 778 and known as Act 259, are contrary to Section 1 of Article 14 of the Constitution of the United States.

5.

Because the court erred in not striking from this files of this cause the amendment to the complaint which was filed January 3rd, 1912, the said amendment being the amendment claiming the penalty and attorney's fee.

6.

Because the court erred in giving a peremptory instruction in favor of the plaintiff.

7.

Because the court erred in refusing to direct a verdict in favor of the defendant.

8.

Because the court erred in refusing to submit the issue as to whether or not the defendant was guilty of negligence to the jury under proper instructions, which request was made by the defendant and overruled by the court.

16

9.

Because the court erred in giving instructions numbered 1 and 2 on behalf of the plaintiff.

10.

Because the court erred in granting and sustaining the motion for the penalty, and in granting the motion for an attorney's fee.

11.

Because the court erred in allowing the penalty and the attorney's fee for the reason that said penalty and said attorney's fee are not authorized by the laws of Arkansas, and deprives this defendants of its property without due process of law, and of the equal protection of the laws as guaranteed in Section 1 of Article 14 of the Constitution of the United States.

Premises considered the defendant prays that the verdict herein be set aside, and that a new trial be granted, and further that the order of the court allowing an attorney's fee and a penalty also be set aside.

JAMES B. McDONOUGH,
Attorneys for Defendant.

Filed in open Court January 10th, 1912.

17 *Filing Bill of Exceptions.*

Bill of Exceptions Filed, March 2nd, 1912.

18 In the Little River Circuit Court, January Term, 1912.

No. 587.

JACOB ANDERSON, Plaintiff,
vs.
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Bill of Exceptions.

Be it remembered, That heretofore, to-wit: on the 4th day of January, 1912, which was a day of the regular term of the Little

River Circuit Court, which court was held at the town of Ashdown in said county and State, the above entitled cause came on for trial. The plaintiff, Jacob Anderson, and the defendant, The Kansas City Southern Railway Company, both announced ready for trial, and a jury was empannelled, according to law, and the trial proceeded before the Honorable Jeff T. Cowling, Judge of said court and a jury.

After the empannelling of the jury, as the law requires, the testimony of plaintiff and defendant was introduced as hereafter shown and set out. The said testimony was taken down in shorthand by the official stenographer, Allen Watkins, and was afterwards reduced to long-hand, as the law requires, and said official stenographer duly certified to said transcribed notes, which notes and certificate are set out below.

The plaintiff to main- the issues upon his part introduced the testimony as shown below in the transcribed notes of the evidence, and the defendant to maintain the issues on its part also introduced the testimony which is fully set out below. The said testimony is all the evidence that was introduced on either side, and all
19 objections and exceptions to said evidence, and all rulings of the court and exceptions thereon are fully set out in said transcribed notes of evidence. The said evidence and the transcribed notes being all of the evidence in the case and show- all proceedings and the taking of testimony, are in words and figures as follows:

20 In the Little River Circuit Court, January Term, 1912.

Docket No. 587.

JACOB ANDERSON, Plaintiff,
vs.
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Testimony of Cecil Parr.

This cause came on for trial January 5th, 1912, before J. T. Cowling, Judge presiding, Steel, Lake & Head representing the Plaintiff, Jacob Anderson, and J. B. McDonough representing the Defendant, Kansas City Southern Railway Company.

The Plaintiff to sustain the issues on his part, introduced the following witnesses:

CECIL PARR, the first witness called in behalf of the Plaintiff, after being duly sworn, testified as follows:

Q. Your name is Cecil Parr?
A. Yes sir.
Q. Do you know Jacob Anderson?
A. Yes sir.
Q. Were you in Wilton one night in April, 1911, or about that time, when it is alleged that Mr. Anderson's colt was killed?

A. Yes sir.
Q. Did you see the train come in that night?
A. Yes sir.
21 Q. State whether you saw the train his this animal?
A. I saw the train hit the animal, yes sir.
Q. Did you see the animal afterwards?
A. Yes sir.
Q. Was it dead?
A. No, it wasn't dead.
Q. About how long afterwards?
A. Just as soon as the train passed the station I went down to see him.
Q. Did it die afterwards?
A. They knocked it in the head. It would have died.
Q. Who knocked it in the head?
A. I don't know.
Q. What part of the train hit the animal?
A. The front end.
Q. What was at the front end?
A. The engine.

Cross-examination:

Q. How far away from the engine were you?
A. I don't know just how far it was.
Q. About how far?
A. I reckon about three hundred yards.
Q. Was it in the day time or night?
A. The night about 11 o'clock.
Q. Was it South bound or North bound?
A. North bound.
Q. At what station was it?
A. Wilton.
22 Q. What direction from the depot building was the colt?
A. South.
Q. How far from the station?
A. About three hundred yards, something like that.
Q. You were at the station were you?
A. Yes sir.

Redirect examination:

Q. Wilton is in Little River County, Arkansas?
A. Yes sir.
Q. The point where this animal was struck was in Little River County, Arkansas?
A. Yes sir.

Witness excused.

23 *Testimony of Jacob Anderson.*

JACOB ANDERSON, the Plaintiff and next witness called, after being duly sworn, testified as follows:

Q. Your name is Jacob Anderson?
A. Yes sir.
Q. Where do you live, Mr. Anderson?
A. Wilton.
Q. How long have you lived there?
A. Six years.
Q. You are suing the railroad here for a horse? You owned that horse did you?
A. Yes sir, I did.
Q. How old was the horse at the time it was killed?
A. Two years old.
Q. How long had you owned the horse at the time it was killed, about how long?
A. About six months, I bought it the first of November.
Q. Describe the horse to the jury as best you can?
A. It was a mare pony, bay, weighing at least 500 pounds.
Q. How old did you say it was?
A. Two years old.
Q. Have you dealt in stock in that vicinity, bought and sold?
A. Yes sir, a right smart.
Q. Do you know the reasonable cash market value of animals of that character in Wilton at that time?
A. I think I do, yes sir.
Q. What in your opinion was the reasonable cash market value of this animal at the time it was killed?
A. It was worth at least sixty dollars to me at that time.
24 Q. That is not the question, what would it reasonably — been worth? What was the reasonable cash market value at that time?
A. Sixty dollars.
Q. Did you see the animal after it was dead or before?
A. I saw it both before and after too.
Q. How long before it was killed that you had seen it?
A. It wasn't over two days.
Q. Next time you saw the animal where did you find it?
A. Right over at the edge of Wilton about 175 yards from the depot.
Q. How far was the animal at that time from the railroad?
A. Six or seven feet.
Q. Did you see any evidence on the track where the animal had been?
A. I saw where the animal had been drug; pushed by the train.
Q. What evidences were there on the ground at that time?
A. Sign.
Q. What was that sign?
A. The ground was sorter pawed up and pushed off.

Q. The ground was torn up and you could tell by that?
A. Yes sir. It must have been pushed off where it struck it and where it was lying ten or fifteen steps.
Q. The animal was killed on the 29th of October—of April, 1911, wasn't it?
A. Yes sir.
Q. After the animal was killed did you put in a claim to the railroad company for the animal and notifying them of the killing?
A. Yes sir, on Monday after the animal was killed Saturday night.

25 Cross-examination:

Q. It was April 29th when the animal was hurt, wasn't it?
A. Yes sir.
Q. 1911?
A. Yes sir.
Q. That is right?
A. Yes sir.
Q. Hadn't you bought the colt three or four months before that?
A No sir, I bought it along in November before that.
Q. The first of November, 1910, was when you bought it, wasn't it?
A. Yes sir, that would be about six months before it was killed.
Q. It wouldn't be quite six months, would it?
A. About that I said.
Q. What did you give for it?
A. I paid $75.00 for two; it and a mule.
Q. What did you pay for this colt?
A I bought them both together.
Q. The mule was worth more than this one wasn't it?
A. There wasn't a great deal of difference.
Q. Didn't you pay $25.00 for this one and $50.00 for the mule?
A. No sir, I paid seventy-five dollars for them both?
Q. Didn't you estimate their value twenty-five dollars for this one and fifty dollars for the mule?
A. No sir.
Q. Did you ever state at any time to Mr. A. G. Brown, one of your neighbors, or anyone else, that you had paid twenty-five dollars for this colt?
A. No sir.

26 PLAINTIFF: I don't object to the question in so far as it pertains to Mr. Brown, but I do object to some other party not named.
COURT: He has already answered the question; go ahead.
To the ruling of the Court the plaintiff at the time excepted and asked that his exceptions be noted of record, which is done.
Q. From whom did you buy the animal?
A. From Jim Malone.
Q. Is he here?
A. No sir, he is in Oklahoma. He was going to leave then is the reason I came to buy it as cheap as I did.

Q. When was the filley two years old if you know?
A. Along about the first of April, I suppose, 1911.
Q. What was the age of the mule that you bought with this?
A. About seven months old.
Q. What was the value of that mule at the time on the market?
A. I would think, what I have been buying at——

Mr. McDonold: I am entitled to the other question.

Court: As nearly as you know, tell him about what your best judgment would be of the reasonable market price——
Q. —of the mule at that time?
A. Somewhere between thirty-five and forty dollars.
Q. You considered the mule worth more than the colt?
A. Yes sir, just a shade more.

Redirect examination:

Q. In what condition was this colt at the time you purchased it?
A. It was tolerably thin order and I taken it and run it in a pasture and mended it up.
Q In what condition was this colt at the time it was killed?
A. It was in tolerably fair fix.
27 Q. Mr. Anderson you testified to the value of that mule colt when you bought it, didn't you?
A. Yes sir.
Q. And at that time I believe you stated that the mule was worth between thirty-five and forty dollars?
A. Yes sir, when I bought it.
Q. And you figured at that time that the mule colt was a shade more valuable than the pony?
A. Yes sir.
Q. You didn't testify to the value of the mule colt at the time the pony was killed?
A. No, when I bought it. He asked me when I bought it.

Witness excused.

28 *Testimony of Joe Cooper.*

Joe Cooper, the next witness called in behalf of the Plaintiff, after being duly sworn, testified as follows:

Q. Your name is Joe Cooper?
A. Yes sir.
Q. Where do you live; in what county?
A. I live in this county. I live at Wilton.
Q Are you acquainted or were you acquainted with a colt of Mr. Anderson's that was alleged to have been killed by the railroad along last year?
A. Yes sir.
Q. What do you say was the reasonable market value of that colt along in April, 1911, when it was killed?
A. I think if it had been mine it would have been worth $60.00.

COURT: It isn't what it would have been worth if it was yours, but what was the reasonable market cash value?

A. It would have brought fifty dollars; just what it was appraised at.

Cross-examination:

Q. Do you know what Mr. Anderson paid for it?

A. He paid seventy-five dollars for it and another little mule colt?

Q. Do you know whether he paid twenty-five dollars for this one or not?

A. No sir, he paid seventy-five dollars for the two.

Q. Are you related to Mr. Anderson?

A. He is my son-in-law.

Q. What was the mule worth at the time the colt was killed?

A. He wintered them all the winter, put them in the field——

29 Q. I didn't ask you that; I want to know what you think was a fair value of the mule at the time the colt was killed?

A. Seventy-five dollars.

Q. What was a fair value of the mule in November, 1910?

A. When he bought it?

Q. Yes. Was it 1909 or 1910 when he bought it?

A. It was last fall, this last fall a year ago.

Q. What was a fair value of the mule at that time?

A. When the pony was killed?

Q. No, at the time they were bought?

A. It was worth more. It was really worth more than he gave for it.

Q. What was the mule worth?

A. It was worth every cent he gave for it and more too.

Q. What was the fair value at the time he bought it in November?

A. It was worth every cent he gave for it and more too.

Q. What was the fair value of the mule at the time he bought it?

A. It was worth thirty-five or forty dollars To get at the real worth of it, it would sell for more than the filley.

Witness excused.

30 *Testimony of Reuben Russell.*

REUBEN RUSSELL, the next witness in behalf of the Plaintiff, after being duly sworn, testified as follows:

Q. Where do you live; in what County?

A. Wilton.

Q. In Little River County?

A. Yes sir.

Q. Are you acquainted with Mr. Anderson?

A. Yes sir.

Q. How long have you lived at Wilton, Mr. Russell?

A. 7th day of this coming June will be nine years.

Q. Were you acquainted with a colt, a two year old mare, belong-

ing to Jacob Anderson alleged to have been killed on the railroad last April?

A. Yes sir.

Q. How long had you known that colt, Mr. Russell?

A. The fall before.

Q. Did you know it when it was owned by the darkey, Malone?

A. Yes sir.

Q. Did you try to trade for it while Malone owned it?

A. I was offering to swap for it.

Q State what business you are engaged in at Horatio?

A. Livery business.

Q. Are you acquainted with the market value of stock of this kind in April of last year?

A. Yes sir, I had some to buy.

Q. You had bought and sold had you?

A. I bought some recently afterwards.

Q. What in your judgment then, would be the market cash value of this colt at the time it was killed in November?

A. Sixty dollars.

31 Cross-examination:

Q. You are in the real estate business, did you say?

A. No sir.

Q. In what business?

A. Livery business.

Q. You are not related to Jacob Anderson?

A. Not at all.

Q. Not in any way?

A. No sir.

Q. How did you estimate the market value?

A. Its age and the size of it.

Q. You mean what it would bring on the market for cash when put up for sale for cash where there is an offer to buy and an offer to sell; is it your opinion it would bring as much as sixty dollars cash?

A. At that time, yes sir. That is what I think; my judgment.

Witness excused.

32 *Testimony of Tom Russell.*

Tom Russell, the next witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

Q. Mr. Russell, where do you live?

A. At Wilton.

Q. Are you acquainted with Jacob Anderson, the Plaintiff in this suit?

A. Yes sir.

Q. Were you acquainted with a two year old mare that he owned that is said to have been killed by the railroad last April?

A. Yes sir.

Q. How long had you known the colt before it was killed?

A. Something like six months I reckon. It run right around my house in an old field.

Q. In what business are you engaged, Mr. Russell?

A. At the present time you mean?

Q. Has been your occupation?

A. Farming.

Q. Do you deal in stock?

A. Yes sir.

Q. Are you acquainted with the market value of stock in general?

A. Yes sir.

Q. What, in your opinion, was the market value of this mare at the time it was killed?

A. Fifty Dollars, I think. It was well worth fifty dollars.

Witness excused.

33 *Testimony of James Clark.*

JAMES CLARK, the next witness called in behalf of the Plaintiff, after being duly sworn, testified as follows:

Q. What is your name?

A. James Clark.

Q. Where do you live, Mr. Clark?

A. At Wilton, or near by there.

Q. How long have you been living there?

A. Since '83.

Q. Are you acquainted with Jacob Anderson?

A. Yes sir.

Q. Were you acquainted with a two year old mare he had there alleged to have been killed by the railroad last April?

A. Yes sir, I had seen her.

Q. What has been your occupation and business, Mr. Clark, for the last several years?

A. Farming.

Q. In farming did you deal in stock?

A. Yes sir.

Q. Have you held any official position in the county up there?

A. Yes sir.

Q. What?

Defendant objected to the question, the Court overruled the objections of the Defendant, to which ruling of the Court the Defendant at the time excepted and asked that its exceptions be noted of record, which is done.

COURT: But I don't see that that would be material.

Q. In your business you handle stock; buy and sell?

A. Yes sir.

Q. Are you acquainted with the market value of stock in your neighborhood or were you in April, 1910?

34 A. Yes sir, some.

Q. What, in your opinion, would have been a fair market price *of* the value of this colt at the time it was killed?

A. I guess it would be something like fifty or sixty dollars.

Q. Do you own any colt anyways related to this colt; come from the same stock?

A. Yes sir.

Q. I will ask you what kin was it to this colt?

A. No sir; no kin at all. I have a colt though something like the size of it.

Witness Excused.

35 *Testimony of Dr. T. D. Cathey.*

Doctor T. D. CATHEY, the next witness called in behalf of the Plaintiff, after being duly sworn, testified as follows:

Q. Where do you live?

A. At Wilton.

Q. Are you acquainted with Jacob Anderson?

A. Yes sir.

Q. Were you acquainted with the colt he had, a two-year old colt last Spring said to have been killed by the railroad?

A. I wasn't before it was killed. I saw it after it was killed.

Q. Are you acquainted with the market value of stock in your neighborhood at that time?

A. Well, I wasn't dealing very much in stock. I never paid any attention to it, much.

Q. You are a doctor by profession?

A. Yes sir.

Q. You handle some stock; what would you say would be the fair market value of this colt last April when it was killed?

Mr. MCDONOUGH: I object to this on the ground he shows he has no acquaintance with the colt until after the colt was killed.

COURT: You might state the condition of the Colt when you saw it.

Mr. HEAD: If he objects, your Honor. We don't want any objectionable errors in it and let him stand aside.

Witness Excused.

36 *Testimony of Robt. E. Wight.*

ROBERT E. WIGHT, the next witness called in behalf of the Plaintiff, after being duly sworn, testified as follows:

Q. Your name is Robert E. Wight?

A. Yes sir.

Q. Where do you live, Mr. Wight?

A. In Wilton.

Q. Are you acquainted with Jacob Anderson?
A. Yes sir.
Q. Were you acquainted with a two year old mare he owned last Spring said to have been killed by the railroad?
A. Yes sir.
Q. How long had you known that colt?
A. Ever since he owned it.
Q. Are you acquainted with the market value of stock and horses in your neighborhood at that time?
A. Yes sir, pretty much.
Q. What, in your opinion, would you say would be the reasonable market value of that colt at the time it was killed?
A. I would say fifty dollars.

Defendant waives cross examination of this witness.
Witness Excused.
At this point the plaintiff rests.

37 The Defendant to sustain the issues on its part introduced the following witnesses:

Testimony of A. G. Brown.

A. G. Brown, the first witness called in behalf of the Defendant, after being duly sworn, testified as follows:
Q. Mr. Brown, where do you live?
A. Three miles north of here; two miles north of Wilton.
Q. What is your business?
A. Farmer.
Q. Are you familiar with the value of stock, horses and such things there?
A. Yes sir.
Q. Were you familiar with this filley of Jacob Anderson's that was killed?
A. Yes sir.
Q. State, in your opinion, what was the fair market value of that colt at the time it was killed?
A. My value of that colt or the market value of that colt would be about thirty-five or forty dollars; between thirty-five and forty dollars.

Cross-examination:

Q. You mean that is what the animal would be worth to you?
A. That is the market value.
Q. What do you mean by market value?
A. What it would sell for.
Q. To anybody that wanted it?
38 A. Yes sir, to the people that had it that raised it.
Q. You bought a mule from Mr. Russell, didn't you, just about that time?
A. Yes sir, I taken the mule in a trade.
Q. Didn't you give fifty dollars for the mule?

Defendant objected to this question.

PLAINTIFF: We want to prove that Rube Russell offered to trade this mule that Brown bought of Russell for the colt last fall and the party would not trade even and afterwards Russell sold the mule to Brown for fifty dollars.

Mr. MCDONOUGH: On account of that statement made by the counsel I ask that the case be withdrawn from the jury and that the case be continued for the term.

The COURT: That is incompetent and the jury will pay no attention to it. It is simply an offer to prove a fact which is incompetent.

Witness Excused.

39 *Testimony of W. H. Toland.*

W. H. TOLAND, the next witness called on behalf of the Defendant after being duly sworn, testified as follows:

Q. Where do you live?
A. At Wilton, in this county.
Q. What is your occupation?
A. I have been running a drug store ever since I have been there until about two months ago.
Q. Were you familiar with the value of stock, of horses and colts, in your vicinity since last April, 1911?
A. No sir, not so very much, while I was one of the appraisers——
Q. Were you familiar with this colt?
A. I don't recollect ever seeing that colt. I may have seen it before it was killed. I don't recollect. I never paid any attention to it.
Q. I will ask you again: you say you were not familiar with the value of colts in that neighborhood?
A. No sir.

Cross-examination waived.
Witness Excused.

40 *Testimony of S. J. Gordon.*

S. J. GORDON, the next witness called in behalf of the Plaintiff, after being duly sworn, testified as follows:
Q. Where do you live, Mr. Gordon?
A. At Wilton.
Q. What business are you in?
A. I have got a gin and a saw mill and a farm. I am a farmer.
Q. How long have you lived in that neighborhood?
A. About twenty years.
Q. Do you know Jacob Anderson?
A. Yes sir.
Q. Do you know the colt or filley that got killed on the railroad?
A. No sir.
Q. Did you see the colt at all?

A. After it was dead. They said it was his.
Q. Did you examine it?
A. After it was dead?
Q. Are you familiar with the market value of animals of that kind as it was at that time?

PLAINTIFF: We object to the witness testifying to the value of the animal after it is dead. It is a poor rule that don't work both ways. If he insists that it is incompetent I won't object.
Question is withdrawn by the Defendant.

Q. Mr. Gordon, I don't know whether or not you are familiar with the market price of animals of that kind at that time.
A. A little bit. I ought to be. I have been handling stock some.
Q. What was your fair market value of that animal at that time?
41 A. I value that at forty dollars.
Q. Is that your opinion of your fair market value?
A. Yes sir.

Cross-examination:

Q. You didn't know the animal until after it was killed?
A. No sir.
Q. It was torn up pretty badly when you saw it, wasn't it?
A. Yes sir.
Q. It was badly swollen at that time, wasn't it?
A. Yes sir, pretty badly swollen.
Q. If you had known the animal in its life time you would have been better able to judge it, wouldn't you?
A. Yes sir.
Q. You spoke of having a conversation with Mr. Anderson on Monday after it was killed?
A. Yes sir.
Q. And in that conversation you said to him he ought to put in the value of that animal for sixty dollars, didn't you?
A. I will just relate that: he wanted fifty dollars for the animal, said it was worth that; I said if you want fifty dollars for it put it in for sixty and they would compromise for fifty.
Q. Didn't you in the same conversation tell him if he had put it in for sixty you would have appraised it at fifty?
A. No sir.
Q. Didn't you tell him you wanted to favor the section foreman so he could hold his job?
A. No, not Mr. Weaver.
Q. What section foreman was it?
42 A. I don't know.
Q. Did you tell the section foreman that?
A. No sir.
Q. Who was it then?
A. It was who ever that claim agent was. I don't know him.
Q. You wanted to favor him?
A. Yes sir.

Q. You did it for that purpose?
A. I told him for that purpose so that he got to work and settled it.
Q. You wanted to favor that claim agent that way?
A. Yes sir.
Q. Is that the claim agent you wanted to favor (indicating)?
A. No, it wasn't him. He was a young fellow. He was over at my house.
Q. Weaver, the section foreman was with you at that time?
A. Yes sir.
Q. He had a bottle didn't he?
A. No sir.
Q. Didn't have any liquor that day?
A. No sir.
Q. It was the young man that had the liquor, wasn't it?
A. No sir. I didn't see him until afterwards. Mr. Anderson and he came over to my house to settle the matter.
Q. Mr. Weaver got you to put a price on that horse before he allowed you to appraise it, didn't he?
A. No sir.

43 Redirect examination:

Q. You started to give an answer there and Mr. Head interrupted you. You started to say something that you would not have appraised the horse; what I want to ask you is, was there anything that occurred there to make you appraise the horse at any more or any less than what you thought it was honestly worth?
A. Nothing at all in the world; no sir. I placed on it just like this: it was a two-year old. I found on it a value of a two year old small. If it had been a yearling colt I would have put a higher price on it but it was too small for a two year old.

Witness excused.
At this point the defendants rest.

44 PLAINTIFF IN REBUTTAL.

Testimony of Jacob Anderson.

JACOB ANDERSON, recalled by the Plaintiff in rebuttal:

Q. What did you say you put in the claim to the Company for this colt?
Mr. MCDONOUGH: Was that in writing?
A. Yes sir.
Mr. MCDONOUGH: I want to object to it until they produce the writing.
Q. What time was it?
A. It was on Monday.
Q. What month?

A. 29th of April.
Q. What year?
A. Last year.
Q. How did you send that claim to the company?
A. By mail.
Q. By United States mail?
A. I turned it over to Mr. Horde, he was the agent at Wilton. I got the answer by mail.

Mr. McDONOUGH: There is another objection; it is this: that this case was brought in the Justice Court and appealed and brought up here. This new matter they are inquiring about now if I understand it was passed upon. I object to it on the ground that it brings in the case a new cause of action and an issue not in the justice court.
COURT: You want to find out here when he put in his claim.
Mr. HEAD: Al- right.

To the ruling of the Court the defendant at the time excepted and asked that its exceptions be noted of record, which is done.

45 For whom was he the agent?
A. For the Kansas City Southern.
Q. Where was he agent?
A. At Wilton.
Q. Did you have any communication from the railroad company acknowledging the receipt of the claim?
A. I got a return from them.
Q. An answer?
A. Yes sir.
Q. To whom did you give that answer?
A. I think I turned it over to you all. Ain't you got it?
Q. Well, you gave it to Judge Steel, didn't you, Mr. Anderson?
A. Yes sir.
Q. That was in the shape of a letter, wasn't it?
A. Yes sir.
Q. And you gave it to Judge Steel?
A. Yes sir, stating they would pay me forty dollars for it.
Q. You handed over this letter to Judge Steel which I now hand you, dated June 1st, 1911?
A. Yes sir, I gave it to him.

Mr. HEAD: I don't want to introduce this in evidence at all, but I want to identify it and let it be marked exhibit A for the purpose of further proof to witness's deposition. I am offering the date of this letter in testimony.
The COURT: The contents of the letter is not offered as I understand but it is simply made an exhibit to show the date.
Mr. McDONOUGH: To that I object but I don't object to the entire letter. I am willing that the entire letter should go in.
COURT: I understand you want to prove by the letter you received a letter of a certain date.
Mr. McDONOUGH: You have got to show what the date is by the writer of the letter.

46 COURT: You can show by that man when he received the letter.

Mr. McDONOUGH: The letter will not prove it.

COURT: I understand: he offers this for the purpose of showing he received a letter dated about a certain time.

Mr. McDONOUGH: We object to establishing the date of another letter with that letter. We object to the introduction of the letter for that purpose but I offer no objection to the introduction of the entire letter.

Mr. HEAD: I am willing that the letter may be read. I want to save any objectionable error in the record here and it is a small matter and I don't want to take any chances on it.

The letter is here introduced and marked Exhibit A to the testimony of the witness, Anderson, and reads as follows:

"TEXARKANA, TEXAS, *June* 1, 1911.

Mr. Jacob Anderson, Wilton, Ark.

DEAR SIR: I have yours of May 15, 1911, in which you refuse my offer of $40.00 for your colt killed April 29, 1911, on mile 464. This is all I can see my way to offer you on this claim, and I made said offer strictly on a compromise basis, as we do not admit that we are at all responsible for killing the colt as it ran into the side of the engine and our engineer could not get out of the way of the animal. If you want $40.00 for the colt you may sign the acceptance blank I sent you on May 13 and return it to me and I will issue a voucher in your favor for the amount. Your proposition to have three disinterested parties place a value on the animal does not interest me, as I have made sufficient investigation to know that $40.00 is as much or more than you could have gotten for the colt in open
47 market.

Yours truly,

(Signed) W. C. ROCHELLE."

Witness excused.

48 *Testimony of J. S. Steel.*

J. S. STEEL, the next witness called in behalf of the Plaintiff, after being duly sworn, testified as follows:

Q. You are one of the attorneys for the plaintiff in this case?

A. Yes sir.

Q. Did Mr. Anderson turn over to you two letters?

A. Yes sir, he turned over two to me.

Q. Purporting to be——

A. —signed by Mr. Rochelle.

Q. You have one of them here?

A. Yes sir.

Q. Have you the other?

A. I misplaced it; lost it. I had it but I haven't it now. I don't see how I done it. I guess it got in my waste basket and got burned up.

Q. Do you know whether the other letter was dated after this letter or before this?

A. Before this one. It was in the early part of May is my recollection about it.

Q. State to the jury what that letter was about?

Mr. McDonough: I don't see they have made sufficient showing for the loss of the letter.

Court: Judge Steel says he has lo-t it and has no idea where it is.

Mr. McDonough: I don't think that is sufficient.

Court: You made a thorough search for it?

A. Yes sir, and had my son, George, to look through all the letters to find it. We have been unable to find it.

Court: Go ahead.

To the ruling of the Court the Defendant at the time excepted and asked that its exceptions be noted of record, which is
49 done.

Q. Just state what that was about, Judge?

A. I don't know as I could repeat all of it. He admitted getting his claim; didn't admit liability, however, but it was an answer of his claim for the horse. He didn't admit liability in the letter but he admitted he had received the claim. It was a receipt of the receiving of the claim. I can state further he made an offer in there for a compromise but he didn't admit any liability at all, but the claim was received in answer to his letter.

Witness Excused.

50 *Testimony of Geo. R. Steel.*

George R. Steel, the next witness called in behalf of the Plaintiff, after being duly sworn, testified as follows:

Q. You are a son of Judge Steel?

A. Yes sir.

Q. Who does the stenographic work and looks after the papers in his office?

A. I do.

Q. State what search you made for the missing letter about which your father has testified?

A. I have looked through all the Little River County papers. I have looked through his letter files and all the scattering letters on his desks and cannot find it.

Q. Do you know of any other place to find it?

A. No sir.

Witness Excused.

51 *Testimony of Jacob Anderson.*

Jacob Anderson, recalled by the Plaintiff in rebuttal.

Q. Did you have a talk with Mr. Gordon on Monday or Tuesday after the colt was killed?

A. I did.
Q. Please state, in that conversation, if he didn't tell you the colt was well worth fifty dollars?
A. That was later he told me that.
Q. Did he tell you that colt——
Mr. McDonough: They didn't ask him about that.
Q. I thought it was the same day.
A. No, it was later on.

Witness Excused.

52 *Testimony of S. J. Gordon.*

S. J. Gordon, called by the Plaintiff for further cross-examination:

Q. Did you at your house thirty days after Mr. Anderson's colt was killed tell Mr. Anderson that the colt was well worth fifty dollars?
A. No sir, I did not.
Q. And that he ought to put it in for sixty dollars?
A. No sir.
Q. You didn't tell him either one of these things at your house?
A. No sir.
Q. You knew he was then asking fifty dollars for it, didn't you?
A. Yes sir.

Witness Excused.

53 *Testimony of Jacob Anderson.*

Jacob Anderson, recalled by the Plaintiff in rebuttal.

Q. Did you go to Mr. Gordon's house or were you at his house about thirty days after this colt was killed?
A. Yes sir, somewhere along there.
Q. Please state if he told you while you were there the colt was worth all you asked for?
A. All I asked for. He didn't say how much.

Witness Excused.
This is all the evidence offered by either side.

54 *Defendant's Objections.*

Defendant excepts to the action of the Court in overruling a peremptory instruction in favor of the Defendant.

The Defendant also objects and excepts to the Court's giving a peremptory instruction in favor of the Plaintiff. This instruction is erroneous because it is an issue for the Jury to determine upon proper instructions, and they are to find from the evidence as to whether or not negligence exists. The Court cannot legally and rightfully instruct the Jury that the Defendant is guilty of negligence in this case under the facts in this case.

Defendant has no objections to Plaintiff's Number 2.

55 *Stenographer's Certificate.*

JANUARY 20TH, 1912.

I, Allen Watkins, do hereby certify that to best of my knowledge the foregoing is a true and correct transcript of my notes of the evidence taken in said cause at the trial of said cause.

ALLEN WATKINS,
Official Stenographer.

56 *Instructions Asked by Defendant.*

The above and foregoing evidence was all of the evidence offered or introduced by either party upon the trial of this cause. The above transcribed notes of the evidence show all objections to the introduction and the exclusion of evidence, and also, all rulings of the court thereon, and the exceptions of the parties thereto.

At the conclusion of the evidence as above set forth, the defendant moved the court to instruct the jury as follows:

1.

The court instructs the jury to find the issues for the defendant.

The court overruled said request for said instruction, and the defendant at the time excepted. Thereupon the defendant moved the court to instruct the jury as follows:

2.

If the jury find from the evidence that the animal in controversy was killed by the running or operation of a train, the presumption of law is that said animal was killed through negligence of the defendant. It is for the jury to say whether the animal was killed by reason of the negligence of the defendant, and in passing upon that issue the jury must consider all of the evidence in the case.

The court refused said instruction and the defendant at the time excepted to the action of the court in not giving said instruction. Thereupon, the court, on his own motion, instructed the jury as follows:

57 *Instructions Given by the Court.*

1.

Your verdict must be for the plaintiff.

The defendant at the time, objected to the giving of said instruction. Said objection was overruled, and the defendant excepted. Thereupon the court gave instruction No. 2.

2.

If you find for the plaintiff you should assess his damages the reasonable cash market value of the horse in controversy, at the time and place it was killed.

Thereupon, and after argument of counsel on both sides, the jury retired to consider of their verdict, and thereafter returned into court the following verdict, to-wit:

"We, the jury, find for the plaintiff, and assess his damages at $50.00."

O. L. DAVIS (*Foreman*).

Thereupon, the defendant requested until January 10th within which to file a motion for a new trial. The court granted the defendant until that day to file said motion for new trial, and thereupon, on January 6th, 1912, the plaintiff filed in open court, a motion for penalty and attorney's fee. The said motion is in words and figures, as follows, to-wit:

Now comes the plaintiff and represents and shows to the Court that he put in his claim on or about the 1st of May, 1911, with the Kansas City Southern Railroad Company, through its regular Claim Agent at Texarkana, for $50, for the killing of the horse in controversy in this action, and that more than thirty
58 days elapsed thereafter and said claim remained unpaid; that thereafter he filed his suit on or about the — day of August, 1911, before a Justice of the Peace in Little River County, Arkansas, asking damages in the sum of fifty dollars for the killing of said horse; that said case was appealed to the Little River Circuit Court and at this term of the Court a jury trial was had and a verdict rendered fixing the value of the horse at the time it was killed in the sum of fifty dollars and a verdict rendered in favor of the plaintiff for that amount; that by reason of the failure to pay said claim within thirty days after said claim was lodged with the defendant; that Plaintiff has become and is entitled to receive a statutory penalty of fifty dollars together with a reasonable attorney's fee and moves the court to assess such penalty and attorney's fee in accordance with the Statute in such case provided.

And thereupon the Court proceed to hear said motion, and by consent of parties it was agreed the court might consider in evidence on this motion all the testimony introduced on the trial of the main cause, and in addition thereto there was introduced on the hearing of said motion the following other testimony, to-wit:

59 In the Little River Circuit Court.

Docket No. —.

JACOB ANDERSON, Plaintiff,

vs.

KANSAS CITY SOUTHERN RAILWAY CO., Defendant.

Hearing on Motion to Tax Penalty and Attorney- Fee.

Evidence on Motion to Tax Penalty. In Attorney's Fee.

Tried Jan. 12, 1912, before J. T. Cowling, Judge. Steel, Lake & Head, representing the Plaintiff and Jas. B. McDonough, representing the Defendant.

Defendant objects to any proof whatever on the motion to tax attorney's fee and double damages.

The Court overruled the motion to which the Defendant excepted. It is agreed however that subject to the objection, the Court may consider as before it the testimony introduced on the trial subject however to the above objection.

Testimony of Jacob Anderson.

JACOB ANDERSON, the first witness called on behalf of the Plaintiff, after being duly sworn, testified as follows:

Q. You are the plaintiff in this suit?
A. Yes sir.
Q. How soon after the horse was killed before you mailed your claim to the Agent of the Kansas City Southern Railway Company?
A. It was killed on Saturday night and I mailed it Monday morning.
60 Q. What amount did you put your claim in for?
A. For fifty dollars.
Q. You have got an acknowledgement of the receipt of that claim from the claim agent?
A. Yes sir.
Q. And that letter from the claim agent was dated sometime about May 13th, was it?
A. Yes sir.

Defendant objected because the letter is the best evidence, the Court overruled the objection of the Defendant and the Defendant excepted.

Q. It was May 13th, 1911, you received that letter.
A. That was about the date. Yes sir.
Q. And you brought the suit in August, 1911.
A. Yes sir.

Witness Excused.

61 *Testimony of A. D. Du Laney.*

A. D. DU LANEY, the next witness called on behalf of the Plaintiff, after being duly sworn, testified as follows:

Q. You are a practising lawyer?
A. Yes sir.
Q. How long have you been in the practice?
A. Actively since 1905; June, 1905.
Q. In this case we tried, the suit against the railroad company for the alleged injury and killing of a mare on the right of way by one of its engines, the suit was brought in Justice Court and thereafter tried in the Circuit Court the amount involved for which suit was brought was fifty dollars alleged value of the animal killed, what, in your opinion, would have been a reasonable fee for legal services rendered at the trial of such a cause?

A. Did Plaintiff's attorneys represent the Plaintiff in the Justice Court?

Q. No.

A. I should think at least twenty-five dollars.

Q. Are you familiar with the fees usually charged by attorneys in such litigation in this section of the country?

A. I am.

Defendant objected to any proof whatever in this case, the Court overruled the motion of the Defendant and the Defendant excepted to the ruling of the Court.

Witness Excused.

All the evidence in the matter of attorney's fee in the above caus-

62 *Exceptions of the Defendant.*

Thereupon, and on January 8th, 1910, the court sustained said motion of the Plaintiff for penalty and attorney's fee, and allowed the plaintiff a penalty of $50.00 and an attorney's fee of $25.00, and the defendant excepted to the action of the court in allowing the penalty and the attorney's fee which exception was taken at the time, and thereupon a judgment was rendered in favor of the plaintiff for the sum of $125.00, and costs, and the defendant at the time excepted to the action of the court in rendering said judgment.

And thereupon, and within the time allowed by the court, and on January 10th, 1912, the defendant filed in open court, and by permission of court, its motion for a new trial, which motion is in words and figures as follows:

"Comes the defendant and moves the court for a new trial herein upon the following grounds, to-wit:

1.

The verdict is contrary to the law and the evidence, and is not supported by any evidence whatever.

2.

The Court erred in permitting the plaintiff to file an amended complaint claiming a penalty of $50.00 and attorney's fee, as no issue of that kind was made in the Justice Court, where this case was originally brought. To permit such an amendment is contrary to the law and raises issues in the Circuit Court which were not raised or tried in the Justice Court, and deprives this defendant of its property without due process of law, and does not give this defendant the equal protection of the laws contrary to Section 1 of Article 14 of the Constitution of the United States.

63 3.

Because the Act of Arkansas, found in Kirby's Digest, Section 6777 and the Acts of 1907 and 1909, attempting to authorize the

penalty and attorney's fee, are void because in conflict with Article 1 of Section 14 of the Constitution of the United States.

4.

Because the Act of 1907, found in the Acts of that year, of the General Assembly of Arkansas, at page 144, amending Section 6774 of Kirby's Digest, and also the Act of the General Assembly of Arkansas, found in the Acts of 1909, page 778 and known as Act No. 259, are contrary to Section 1 of the Constitution of the United States.

5.

Because the court erred in not striking from the files of this cause the amendment to the complaint which was filed January 3rd, 1912, the said amendment being the amendment claiming the penalty and an attorney's fee.

6.

Because the court erred in giving a peremptory instruction in favor of the plaintiff.

7.

Because the court erred in refusing to direct a verdict in favor of the defendant.

8.

Because the court erred in refusing to submit the issue as
64 to whether or not the defendant was guilty of negligence to the jury under proper instructions, which request was made by the defendant and overruled by the court.

9.

Because the court erred in giving instruction- numbered 1 and 2 on behalf of the plaintiff.

10.

Because the court erred in granting and sustaining the motion for the penalty, and in granting the motion for an attorney's fee.

11.

Because the court erred in allowing the penalty and the attorney's fee for the reason that said penalty and said attorney's fee are not authorized by the Laws of Arkansas, and deprive this defendant of its property without due process of law, and of the equal protection of the laws as guaranteed in Section 1 of Article 14 of the Constitution of the United States.

Premises considered the defendant prays that the verdict herein be set aside, and that a new trial be granted, and further that the order of the court allowing an attorney's fee and penalty also be set aside."

The said motion for new trial came on for hearing, and the court being well and sufficiently advised in the premises overruled said motion for a new trial, and the defendant at the time excepted, and still excepts, and the defendant asked leave of court for ninety days in which to prepare and file its bill of exceptions herein, which time of ninety days was, by the court granted. The said
65 time to begin to run at the time of the overruling of the motion for new trial herein.

Approval of Bill of Exceptions.

And now comes the defendant and within the time allowed by the court for filing its bill of exceptions herein, and presents this, its bill of exceptions, and asks that the same be signed, sealed and made a part of the record herein which is accordingly done, and the said defendant at the time of the overruling of the motion for a new trial herein and now prays an appeal to the Supreme Court, which appeal is by the court granted, and this bill of exceptions signed, sealed and made a part of the record herein.

Witness my hand as Judge of the Ninth Judicial Circuit this 29, day of February, 1912.

JEFFERSON T. COWLING,
Judge of the Ninth Judicial Circuit.

66 *Clerk's Certificate.*

STATE OF ARKANSAS,
County of Little River, ss:

I, Ed Jones, Clerk of the Circuit Court within and for the County of Little River and State of Arkansas, do hereby certify that the annexed and foregoing pages of typewritten matter constitutes a true, complete and perfect transcript of all record entries, original pleadings and papers had in the trial of a certain case in said Court, at the January, 1912, term thereof, numbered 587, in which Jacob Anderson was plaintiff and The Kansas City Southern Railway Company was defendant, as the same appears from the records and files in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Ashdown, Little River County, Arkansas, on this the 13th day of March, 1912.

[SEAL.]

ED JONES,
Clerk of the Circuit Court.

67 *Fee Bill.*

J. W. Pipkin, J. P.	$2.80
J. H. Clark, Constable	2.30
Witnesses in J. P. Court	2.50
A. T. Collins, Sheriff	10.05

W. H. Toland, Witness	Circuit	Court	3	days	.....	4.50
J. P. Cooper,	"	"	3	"	.....	4.50
Cecil Parr,	"	"	3	"	.....	4.50
J. T. Russell,	"	"	3	"	.....	4.50
T. D. Cathey,	"	"	2	"	.....	3.00
R. Russell,	"	"	3	"	.....	4.50
A. G. Brown,	"	"	3	"	.....	4.50
J. H. Clark,	"	"	3	"	.....	4.50
R. E. White,	"	"	2	"	.....	3.00
S. J. Gordon,	"	"	3	"	.....	4.50
Ed Jones, Clerk					.....	14.15
Ed Jones, Clerk, This Transcript					.....	11.00

68 *Filing in Supreme Court.*

Little River.

No. 2125.

KANSAS CITY SOUTHERN RY. CO.
vs.
JACOB ANDERSON.

J. T. Cowling, J.

Transcript.

Filed April 1, 1912. P. D. English, Clerk.

69 STATE OF ARKANSAS, *ss:*

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 27th day, being the fourth Monday of May, A. D. 1912, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 17th day of June, 1912, a day of said term:

Record Entries.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant,
vs.
JACOB ANDERSON, Appellee.

Appeal from Little River Circuit Court.

On appellant's motion this cause it set down for oral argument on June 24th inst.

And on the 24th day of June, 1912, the following proceedings were had in said cause, to-wit: (omitting caption).

This cause being regularly —, come the parties thereto by their attorneys, and said cause is submitted upon the transcript of the record and the briefs filed and upon oral argument, and is by the Court taken under advisement.

70 And on the 1st day of July, 1912, the following proceedings were had in said cause, to-wit (omitting caption):

Judgment.

This cause came on to be heard upon the transcript of the record of the circuit court of Little River County, and was argued by counsel, on consideration whereof it is the opinion of the court that there is no error in the proceedings and decree of said circuit court in this cause.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things, affirmed with costs, and that said appellee recover of said appellant and National Surety Company, surety in the supersedeas bond filed in this cause, the sum of One Hundred and Twenty-five Dollars, with interest at the rate of six per cent. per annum from the 5th day of January, A. D. 1912, the amount of judgment of said circuit court.

It is further considered that said appellee recover of said appellant and said surety all his costs in this court and the court below in this cause expended, and have execution thereof.

71 In the Supreme Court of Arkansas, July 1, 1912.

No. 53.

KANSAS CITY SOUTHERN RAILWAY CO.
vs.
ANDERSON.

Opinion.

FRAUENTHAL, *J.*:

This is an appeal from a judgment awarding to appellee double damages and attorney's fees for a mare killed by one of the appellant's trains. The appellant seeks a reversal of the judgment for the reason that errors, as it claims, were committed by the lower court in the trial of the case, but principally upon the ground that the act of the Legislature, approved February 27, 1907, (Acts of 1907, p. 144) under which the recovery for double damages and attorney's fee was allowed, is unconstitutional and void. The suit was originally brought by appellee before a justice of the peace for the recovery of $50, the alleged value of the mare. From a judg-

ment in his favor, an appeal was taken to the circuit court. In that court, appellee filed an amendment to his complaint or claim, in which he alleged that appellant had failed and refused to pay for said mare for more than 30 days after notice had been served and demand made upon it for the value thereof, in accordance with said act, and therein he asked for double damages and attorney's fee by virtue of its provisions.

It is urged that this amendment in effect set up a new cause of action, and that the circuit court erred in permitting it to be made. No objection was made by the appellant to the filing of the amendment nor to the order of the circuit court permitting it to be made.

72 The appellant then filed its answer to this amended complaint and joined issue thereon. Even if by this action the appellant did not enter its appearance to this additional claim and waive the objection it now urges (Kansas City Sou. Ry. Co. v. Tonn. (Ark.) 143 S. W. 577), we are of opinion that this claim for double damages and attorney's fee was not a new cause of action. The cause of action upon which appellee's suit is based is the wrongful killing of his mare, and the amount of the recovery given by the above act is the damage arising out of the cause of action. It has been repeatedly held by this court that after an appeal is taken from a justice of the peace court, the circuit court may permit an amendment by adding claims which were not included in the original demand or by increasing the amount of such demand, only keeping out new causes of action. St. L. I. M. & So. Ry. Co. v. Bryant, 92 Ark. 425.

It is urged that the court erred in admitting certain testimony and in the instructions it gave. The exception made by the appellant to the court's ruling in admitting said testimony over its objection has not been preserved by making it an assignment of error in its motion for a new trial; for this reason, the alleged error cannot be reviewed by us on this appeal. The court instructed the jury to return a verdict in favor of the plaintiff and to assess the amount of his damages at the reasonable cash market value of the mare at the time and place she was killed. It is contended that the right of appellee to recover should have been submitted to the jury. The uncontroverted evidence shows that the mare was killed by one of defendant's trains. There was no testimony adduced showing or tending to show that appellant or its employees exercised ordinary care, or were free from negligence at the time the mare was killed.

73 It has been repeatedly held that by virtue of our statute imposing liability upon railroad companies for injury done to property by the running of their trains, a prima facie case of negligence is made out by proof of the injury done by the running of such trains. This presumption of negligence may be rebutted by evidence; but if this *train* is not done, then the presumption of negligence becomes conclusive. The court, therefore, did not err in the instructions given. Midland Valley R. Co. v. Skinner, (Ark.) 138 S. W. 969.

It is earnestly contended that the above act of the Legislature imposing upon a railroad company double damages and attorney's fees

for failure to pay for stock killed by its trains is unconstitutional and void in that it deprives it of its property without due process of law. In the case of St. L. I. M. & S. Ry. Co. v. Wynne, 92 Ark. 538, the constitutionality of this statute was challenged. After a careful consideration of the question, this court held that the statute is valid. The case was then carried by writ of error to the Supreme Court of the United States, and the judgment was by that court reversed. It is urged by counsel for appellant that the Supreme Court of the United States in that case determined that this statute as construed by this court is violative of the provision of the constituion inhibiting the taking of property without due process of law, and for that reason is invalid; and that the statute, therefore, is void inasmuch as the construction placed thereon by this, the highest court of the State in which it was enacted, fixed its meaning and its application. But the Supreme Court of the United States expressly refrained from passing upon the constitutionality of this statute. In the opinion delivered it said. "In the brief for the railway company, the contention is advanced that the statute would still be
74 wanting in due process of law were it construed as imposing double liability with an attorney's fee only where the prior demand is fully established in the suit following the refusal to pay; but that question does not necessarily arise upon the facts of this case, and we purposely refrain from considering it." (See opinion delivered by the Supreme Court of the United States, April 15, 1912, St. L. I. M. & S. Ry. Co. v. Wynne.) In the application of the statute to the facts of that case, as the Supreme Court of the United States found them, it declared that it is violative of the constitutional provision of due process; and with that holding, we think that the construction placed upon the statute by this court is not in conflict. It found that the owner of the stock had served notice demanding damages in the sum of $500, and that subsequently he sued for only $400 damages and recovered only that amount. Upon that finding, it will be observed, the court said that the prior demand was excessive and that the company rightfully refused to pay it. The court then held that the application of the statute to such a state of facts would subject the company to an extraordinary liability for refusing to pay an excessive demand before suit, and that the statute so construed was violative of constitutional rights. With this holding, we think the decisions of this court are in perfect accord. In the case of Pacific Mutual Insurance Co. v. Carter, 92 Ark. 378, referred to by the Federal Supreme Court in its opinion, it was held that the statute of this State providing that if a loss under a policy of insurance was not paid within the time specified after a demand made therefor, the company should be liable, in addition to the amount of the loss, to 12% damages and a reasonable attorney's fee, would be invalid when applied to a case where an excessive amount was demanded before suit; and we are of opinion that the
75 decision made by this court in the case of St. L. I. M. & S. Ry. Co. v. Wynne, supra, is not in conflict with the opinion rendered in that case, but on the contrary, is in perfect harmony with it. The state of the facts as presented to this court in the case

of Ry. Co. v. Wynne, did not show that the amount of the recovery was less than the amount demanded before suit. In that case, therefore, the question was not presented nor decided, as to whether or not the statute would be applicable to a case based upon a state of facts wherein the amount recovered was less than the sum asked for before the suit was instituted. Under the rules of this court, an abstract of the testimony adduced upon the trial of a case must be made and filed by the party taking the appeal, and if the abstract of the testimony thus made is not controverted by the opposing party, it is presumed to be a correct statement of the facts as contained in the record. It will be seen from an examination of the statement of the abstract and brief of the attorneys in that case as well as from the opinion itself that the case was decided on the theory that the amount sued for and recovered was equal to the amount demanded before suit was brought. The fact that the testimony in that case showed that the amount demanded before suit was greater than the amount recovered was, therefore, presented for the first time in the Supreme Court of the United States, and the question of the construction of the statute as applied to that state of facts was raised for the first time in that court. The opinion rendered by this court in that case was based upon the state of facts which was presented to this court. A careful examination of the opinion rendered by this court in that case will, we think, show that this court did not place upon this statute a construction that would make it applicable to a case based upon a state of facts where a demand had been made before suit for a sum greater than that recovered upon a
76 trial. In the opinion rendered in that case we said, "A wholesome feature of this statute which should not be overlooked in considering the question of its reasonableness is that double damages cannot be recovered where the verdict of a jury assessing the amount of damages is less than the amount sued for, thus putting a check on the extravagant and unwarranted claims being made." The construction and application of this statute as made by this court is, therefore, not such as to render it invalid under the decisions made by the Supreme Court of the United States.

In the case at bar, the testimony shows that the amount recovered on the trial was equal to the amount demanded before suit was brought, and that the appellant failed to pay the amount so demanded within 30 days after notice served on it by appellee. As applied to such a state of facts, this court held in the Wynne case that the statute is constitutional and valid, and we see no reason for overruling that decision. The judgment is accordingly affirmed.

77 *Filing Motion for Rehearing.*

And on the 8th day of July, 1912, the following proceedings were had in said cause, to-wit (omitting caption):

Comes the appellant by attorneys and files a petition for rehearing, which, being duly served, is submitted and by the court taken under advisement.

78 In the Supreme Court of Arkansas.

No. 2125.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant
vs.
JACOB ANDERSON, Appellee.

Petition for Rehearing.

Comes the appellant, The Kansas City Southern Railway Company, and petitions the court herein for a rehearing in this cause, and for grounds states as follows:

I.

The court has inadvertently held that the Act of Arkansas approved February 27th, 1907 is valid. The said Act which the Court has held to be valid, is in words and figures as follows:

"Be it enacted by the General Assembly of the State of Arkansas:

Section 1. That Section 6774 of Kirby's Digest be amended to read as follows:

Section 6774. Whenever any stock, such as horses, cows, hogs, sheep, etc., are killed, wounded or injured by railroad trains running in this State the conductor or engineer on the train doing the damage shall cause the station master or overseer at the nearest station house to the killing or wounding to post within one week thereafter, and to keep posted for twenty days thereafter, a true and correct description of such stock as may have been so killed or wounded at the nearest station house and nearest depot house, giving a true and correct description of the color, marks, brands and other natural description, that may assist in identifying such stock, and the time when and place where killed or wounded;
79 and on failure to so advertise any stock so killed or wounded, the owner shall recover double damages for all stock killed and not advertised. And said railroad shall pay the owner of such stock within thirty days after notice is served on such railroad by such owner. Failure to do so shall entitle said owner to double the amount of damages awarded him by any jury trying such cause, and a reasonable attorney's fee.

And provided further, that if the owner of such stock killed or wounded shall bring suit against such railroad after the thirty days have expired, and the jury trying such cause shall give such owner a less amount of damage than he sues for, then such owner shall recover only the amount given him by said jury and not be entitled to recover any attorney's fees.

Section 2. That all laws and parts of laws in conflict are hereby repealed, and that this Act take effect and be in force from and after its passage.

Approved February 27, 1907.

II.

The court has inadvertently held that said Act of Arkansas, in-so-far as it assesses double damages, is a valid enactment.

III.

The court has also inadvertently held that said Act in-so-far as it assesses an attorney's fee is valid.

IV.

The said Act of Arkansas, in-so-far as it assesses double damages, and in-so-far as it assesses an attorney's fee, is contrary to
80 Section 1 of Amendment 14, of the Constitution of the United States, in that said Act of Arkansas above named being Act 61 of the General Assembly of Arkansas, of 1907, is the fundamental rights of the appellant embraced within and protected by said Section 1 of the 14th Amendment to the Constitution of the United States, and is class legislation contrary to said Constitution of the United States, and attaches onerous penalties to the non-payment of the unreasonable and extravagant demands, and takes the property from this appellant and gives it to the appellant contrary to said Section of the Constitution of the United States, and said Act of Arkansas thereby deprives the appellant of its property without due process of law, and denies to it the equal protection of the laws contrary to said 14th amendment to the Constitution of the United States.

V.

The court in its opinion has inadvertently held that the suit for double damages and an attorney's fee was brought in a court of the Justice of the Peace, whereas said suit was not so brought, and said Act of Arkansas above set fort has construed by this court in the opinion, in holding that the suit was so brought, denies to this appellant the equal protection of laws, and takes from it its property without due process of law, contrary to Section 1, of the 14th Amendment to the Constitution of the United States.

VI.

The court has inadvertently held that the said Act of Arkansas, and all amendments thereto, and all the laws of Arkansas thereon, fixing a double liability and an attorney's fee are valid, whereas said laws are in violation of Section 1 of the 14th amendment
81 to the Constitution of the United States in that they deprive The Kansas City Southern Railway Company of its property without due process of the laws.

VII.

The court has inadvertently held that the court below properly directed a verdict in favor of the plaintiff. Such a construction

of the laws of Arkansas deprives the defendant of the equal protection of the laws, contrary to the 14th amendment to the Constitution of the United States.

VIII.

This court has inadvertently held that this case is not controlled by the case of S. C. & S. F. R. R. Co. vs. Ellis, 165 U. S. 150, and has also inadvertently held that this case is not controlled by the case of St. L. I. M. & S. Ry. Co. vs. Wynne.

Premises considered The Kansas City Southern Railway Company prays that this its petition for rehearing be granted and that this cause be reversed, and in addition, that the recovery of the penalty and the attorney's fee be set aside and held for naught.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By JAMES B. McDONOUGH,
Its Attorney.

Certificate.

I, James B. McDonough, do hereby certify that I have carefully read over the opinion of the court in the above entitled cause, and I further certify that in my judgment the petition for rehearing is well taken.

JAMES B. McDONOUGH,
Attorney for the Kansas City Southern Railway Company.

82 *Petition for Rehearing Denied.*

And on the 15th day of July, 1912, the following proceedings were had, to-wit (omitting caption):

Being fully advised, the petition for rehearing filed herein is by the Court overruled.

83 *Clerk's Certificate.*

SUPREME COURT,
State of Arkansas, ss:

I, Peyton D. English, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of The Kansas City Southern Railway Company, Appellant, vs. Jacob Anderson, Appellee, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this July 24, 1912.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas,
By J. H. CAMPBELL,
Deputy Clerk.

84 *Assignment of Errors.*

In the Supreme Court of the State of Arkansas.

No. 2125.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
JACOB ANDERSON, Defendant in Error.

Assignment of Errors and Prayer for Reversal.

Now comes the above Plaintiff in Error, The Kansas City Southern Railway Company, and respectfully submits that in the record, proceedings, decision and final judgment in the Supreme Court of the State of Arkansas in the above entitled cause there is manifest error in this, to-wit:

I.

Because the Supreme Court of the State of Arkansas denied to the Plaintiff in Error, The Kansas City Southern Railway Company, a right, privilege and immunity granted to it by Section one of Amendment Fourteen of the Constitution of the United States.

II.

Because the Supreme Court of Arkansas has erroneously held and declared that the Supreme Court of the United States has not passed upon and adjudged the Act of Arkansas, approved February 27, 1907 void and of no effect.

III.

Because said Act of the State of Arkansas as construed by the Supreme Court of Arkansas takes the property of this Plaintiff in Error without due process of law in violation of Section
85 one of the Fourteenth Amendment of the Constitution of the United States, and contrary to that section also, deprives this Plaintiff in Error of its property without due process of law, and denies to it the equal protection of the laws.

IV.

Because the Supreme Court of Arkansas in its decision and opinion in this cause denied to this Plaintiff in Error its rights and immunities arising and growing out of a proper construction of Section one of Article Fourteen of the Amendments to the Constitution of the United States.

V.

Because the Supreme Court of the State of Arkansas held the following act of the General Assembly of the State of Arkansas to be a valid and binding law, which is as follows:

"Be it enacted by the General Assembly of the State of Arkansas:

SECTION 1. That Section 6774 of Kirby's Digest be amended to read as follows:

SECTION 6774. Whenever any stock, such as horses, cows, hogs, sheep, etc., are killed, wounded or injured by railroad trains running in this State, the conductor or engineer on the train doing the damage shall cause the station master or overseer at the nearest station house to the killing or wounding to post within one week thereafter, and to keep posted for twenty days thereafter, a true and correct description of such stock as may have been killed or wounded at the nearest station house and nearest depot house, giving a true and correct description of the color, marks, brands and other natural description, that may assist in identifying such stock, and the
86 time when and place where killed or wounded; and on failure to so advertise any stock so killed or wounded, the owner shall recover double damages for all stock killed and not advertised. And said railroad shall pay the owner of such stock within thirty days after notice is served on such railroad by such owner. Failure to do so shall entitle said owner to double the amount of damages awarded him by any jury trying such cause, and a reasonable attorney's fee.

And provided further, that if the owner of such stock killed or wounded shall bring suit against such railroad after the thirty days have expired, and the jury trying such cause shall give such owner a less amount of damage than he sues for, then such owner shall recover only the amount given him by said jury and not be entitled to recover any attorney's fees.

SECTION 2. That all laws and parts of laws in conflict are hereby repealed, and that this Act take effect and be in force from and after its passage.

Approved February 27, 1907."

VI.

The said Supreme Court of Arkansas, by its decision and opinion in this cause in upholding said Act as to the attorney's fee and also as to double damages, has deprived this Plaintiff in Error of its property without due process of law, and has denied to it the equal protection of the laws contrary to Section one of the Fourteenth Amendment to the Constitution of the United States.

VII.

The Supreme Court of Arkansas by its decision and opinion in upholding said Act of Arkansas as to the attorney's fee has deprived this Plaintiff in Error of its property without due
87 process of law, and has denied to this Plaintiff in Error the equal protection of the laws contrary to the said Section one of the Fourteenth Amendment of the Constitution of the United States. The said Act of Arkansas, and no other law of Arkansas fixes against other persons and corporations similarly situated any such attorney's fee.

VIII.

The said Supreme Court of Arkansas by its decision and opinion in this cause upholds the double penalty clause of said Act of Arkansas, and thereby deprives this Plaintiff in Error of its property without due process of law, and denies to this Plaintiff in Error the equal protection of the laws contrary to said Section one of the Fourteenth Amendment of the Constitution of the United States. The said laws of the State of Arkansas do not fix against any other persons, or corporations or citizens of said State said double liability.

IX.

The said Supreme Court of Arkansas by its judgment and decision held that the defendant in error properly amended its complaint in the Circuit Court of Little River County, State of Arkansas, and said Supreme Court of Arkansas by holding that said amendment was properly made deprived this Plaintiff in Error of its property without due process of law, and denied it the equal protection of the laws contrary to Section one of the Fourteenth Amendment of the Constitution of the United States.

X.

The plaintiff in error respectfully shows that it has filed herein its petition for rehearing, and the same has been by the Supreme Court of Arkansas denied.

XI.

Because the Supreme Court of Arkansas erred in holding that the provisions of the Act of Arkansas heretofore set forth did not deprive this plaintiff in error of its property without due process of law, and did not deprive this plaintiff in error of the equal protection of the laws.

Wherefore, the Plaintiff in Error, The Kansas City Southern Railway Company, prays that the final decision of the Supreme Court of Arkansas in this cause be reversed by the Supreme Court of the United States, and that this cause be dismissed on its merits or reversed and remanded for new trial.

88

THE KANSAS CITY SOUTHERN RY. CO.,
By S. W. MOORE,
JAS. F. READ,
JAMES B. McDONOUGH,
Attorneys for Plaintiff in Error.

Filed July 24, 1912.

PEYTON D. ENGLISH, *Clerk,*
By J. H. CAMPBELL, *D. C.*

89 In the Supreme Court of the State of Arkansas.

No. 2125.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
JACOB ANDERSON, Defendant in Error.

Petition for Writ of Error.

UNITED STATES OF AMERICA,
State of Arkansas:

To the Honorable Chief Justice of the Supreme Court of the State of Arkansas:

The petition of The Kansas City Southern Railway Company respectfully shows that on the first day of July, 1912, the Supreme Court of Arkansas returned a final judgment against your petitioner in a certain cause wherein Jacob Anderson was plaintiff and your petitioner was defendant for the sum of $125.00 and all costs, as will appear by reference to the records proceedings in said cause; that said Supreme Court of the State of Arkansas is the highest court of said State in which a decision could be had, and your petitioner, The Kansas City Southern Railway Company claims the right to remove said judgment to the Supreme Court of the United States by writ of error under Section 709 of the Revised Statutes of the United States, and all amendments thereto, including the Act of Congress approved March 3rd, 1911 because your petitioner claims that the said judgment and decision of the said Supreme Court of Arkansas in upholding the attorney's fee and the double
90 damages named and set out in said opinion, judgment and decision of the Supreme Court of the State of Arkansas deprives your petitioner of its property without due process of law, and denies to it the equal protection of the laws as provided in Section one of the Fourteen- Amendment of the Constitution of the United States of America.

Your petitioner claims that it is not liable for the attorneys' fee nor the double damages, both of which were upheld and sustained by the opinion, decision and judgment of the said Supreme Court of Arkansas in this cause.

Your petitioner further shows that the Act of Arkansas mentioned and described in said opinion, decision and judgment is void as to the attorney's fee, and the double damages, and your petitioner claimed and alleged in its answer which was filed in the Circuit Court of Little River County, State of Arkansas in accordance with law, that said Act of Arkansas was void as to the attorney's fee and double damages, and your petitioner properly claimed said invalidity of said Act of Arkansas in said Circuit Court of Little River County, and in the Supreme Court of Arkansas, all of which

appears by the record of the proceedings in said cause, and your petitioner herewith offers proper supersedeas bond.

Wherefore, your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States and for citation and supersedeas, and your petitioner will ever pray. Assignment of errors herewith filed.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By READ & McDONOUGH,
JAMES B. McDONOUGH,
Its Attorneys.

Filed July 24, 1912.
PEYTON D. ENGLISH, *Cl'k,*
By J. H. CAMPBELL, *D. C.*

91 In the Supreme Court of the State of Arkansas.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
JACOB ANDERSON, Defendant in Error.

Allowance of Writ of Error.

Let the writ of error issue upon the execution of a bond in the sum of Five Hundred Dollars; such bond when approved to act as a supersedeas.

EDGAR A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

92 Copy.

In the Supreme Court of Arkansas.

2125.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
JACOB ANDERSON, Defendant in Error.

Bond.

Know all men by these presents:

That we, The Kansas City Southern Railway Company, as Principal, and the National Surety Company, as Surety, are held and firmly bound unto Jacob Anderson in the sum of Five Hundred Dollars ($500.00), as hereinafter provided.

Sealed with our seals, and dated this 16th day of July, 1912.

Whereas, the above-named plaintiff in error seeks to prosecute its writ of error to the U. S. Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Arkansas.

Now, therefore, The condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By READ & McDONOUGH.
NATIONAL SURETY COMPANY,
By JAMES B. McDONOUGH, *Attorney in Fact.*

Bond approved, and to operate as a supersedeas.

EDGAR A. McCULLOCH,
Chief Justice of the Supreme Court of Arkansas.

Filed July 24, 1912.
PEYTON D. ENGLISH, *Clerk,*
By J. H. CAMPBELL, *D. C.*

93 *Writ of Error, &c.*

In the Supreme Court of the State of Arkansas.

No. 2125.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
JACOB ANDERSON, Defendant in Error.

Writ of Error and Allowance Thereof.

UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said court before you or some of you being the highest court of law or equity of the said state in which a decision could be had, in the said suit between The Kansas City Southern Railway Company, defendant and plaintiff in error, and Jacob Anderson, plaintiff and defendant in error, wherein was drawn in question the validity of the Act of Arkansas of February 27, 1907 which Act assessed an attorney's fee and double damages against railroad companies for failing to pay stock claims within a

certain time, and the decision of the said Supreme Court of Arkansas was that said Act of Arkansas was not in conflict with Section one of Amendment Fourteen of the Constitution of the United States, and did not deny to the Plaintiff in Error the equal protection of the laws a manifest error hath happened to the great damage of The Kansas City Southern Railway Company, plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given
94 that then under your seal, distinctly and openly, you send the record and proceedings with all things concerning the same to the Supreme Court of the United States together with this writ so that you may have the same at Washington on the 1st day of September, 1912, next, in the said Supreme Court to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward W. White, Chief Justice of the Supreme Court of the United States the 24th day of July, A. D. 1912.

[The Seal of the District Court, of East. Dist. Ark., Western Division, U. S. A.]

SID B. REDDING,
Clerk of the District Court of the United States for the Eastern District of Arkansas, Western Division,
By F. P. FIELD, Jr.,
Deputy Clerk.

Allowed by:
EDGAR A. McCULLOCH,
Chief Justice of the Supreme Court of the State of Arkansas, Now and at the Time of the Rendition of said Judgment.

Filed July 24, 1912.
PEYTON D. ENGLISH, *Clerk,*
By J. H. CAMPBELL, *D. C.*

95 *Certificate of Lodgement.*

Supreme Court,
State of Arkansas, ss:

I, Peyton D. English, clerk of the said court, do hereby certify that there was lodged with me as such clerk on July 24, 1912, in the matter of The Kansas City Southern Railway Company, versus Jacob Anderson:

1. The original bond of which a copy is herein set forth.
2. Copies of the writ of error, as herein set forth,—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Little Rock, Arkansas, this July 24, 1912.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas,
By J. H. CAMPBELL,
Deputy Clerk.

96 *Citation.*

In the Supreme Court of the State of Arkansas.

No. 2125.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
JACOB ANDERSON, Defendant in Error.

Citation—Acceptance of Service.

UNITED STATES OF AMERICA, *Set:*

To Jacob Anderson, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of Arkansas wherein The Kansas City Southern Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edgar A. McCulloch, Chief Justice of the Supreme Court of Arkansas, this 24th day of July, 1912.

EDGAR A. McCULLOCH,
Chief Justice of the Supreme Court of Arkansas, Now and at the Time of the Rendition of said Judgment.

Attest:
PEYTON D. ENGLISH, *Clerk,*
By J. H. CAMPBELL,
Deputy Clerk.

Copy of the within citation received this 19th of July, 1912.

JAMES S. STEEL,
J. D. LAKE, AND
JAMES D. HEAD,
Attorney- for Defendant in Error.

Filed July 24, 1912.
PEYTON D. ENGLISH, *Clerk,*
By J. H. CAMPBELL, *D. C.*

97 *Return to Writ of Error.*

UNITED STATES OF AMERICA,
Supreme Court of Arkansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this July 24, 1912.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas,
By J. H. CAMPBELL,
Deputy Clerk.

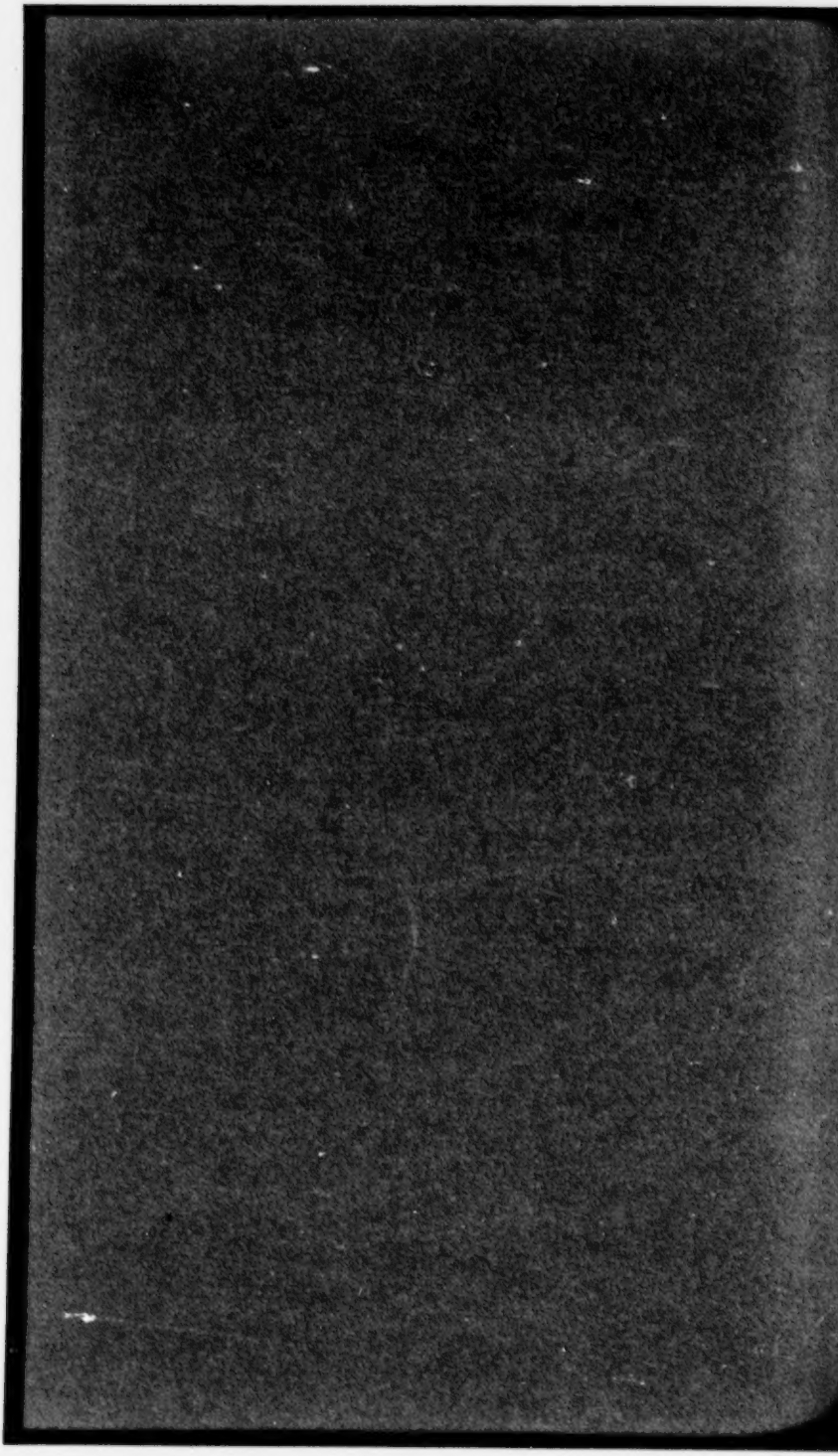
Costs of Suit.

Circuit Court	$73.80
Supreme Court	37.50
Making Transcript for the Supreme Court of the United States on Writ of Error	30.00

Paid by Plaintiff in Error.

PEYTON D. ENGLISH, *Clerk,*
By J. H. CAMPBELL, *D. C.*

Endorsed on cover: File No. 23319. Arkansas Supreme Court. Term No. 319. The Kansas City Southern Railway Company, plaintiff in error, vs. Jacob Anderson. Filed August 2, 1912. File No. 23319.



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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1913.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Plaintiff in Error,*

vs.

JACOB ANDERSON, *Defendant in Error.*

No. 319.

In Error to the Supreme Court of Arkansas.

Brief and Argument for Plaintiff in Error.

STATEMENT.

This case involves the validity of a statute of the State of Arkansas which provides, among other things, that if live stock is killed, wounded or injured by a railroad train, and the railroad shall fail to pay for such live stock within thirty days after notice is served on the railroad by the owner, the owner shall be entitled to double the amount of damages awarded him by any jury trying the case, and a reasonable attorney's fee, provided that if the owner brings suit after the thirty days have expired and the jury try-

ing the cause gives the owner a less amount of damage than he sues for, then the owner shall recover only the amount awarded by the jury, and not be entitled to recover any attorney's fee. This is the statute that was held unconstitutional by this court in the case of *St. Louis, Iron Mountain & Southern Railway Company* v. *Wynne,* 224 U. S., 354, where the owner sued for and recovered a less amount than he had demanded in his notice.

A colt belonging to the defendant in error, hereinafter referred to as the plaintiff, was fatally injured by a railroad train on the outskirts of the town of Wilton, Arkansas. The plaintiff, on April 29, 1911, delivered a written notice of his claim for the sum of $50.00 to the agent of the plaintiff in error, hereinafter referred to as the defendant (21-22, 28). The claim agent of the defendant, about May 13, 1911, acknowledged receipt of plaintiff's claim, stating that it was doubtful whether the defendant was liable, but offering to pay plaintiff $40.00 (22-24, 28). Plaintiff refused to accept this offer, and defendant's claim agent wrote the following letter to plaintiff under date of June 1, 1911, explaining why he offered forty dollars:

> "I have your letter of May 15, 1911, in which you refuse my offer of $40.00 for your colt, killed April 29, 1911, on mile 464.
>
> This is all I can see my way to offer you on this claim and I made this offer strictly on a compromise basis, as we do not admit that we are at all responsible for killing the colt, as it ran into the side of the engine and our engineer could not get out of the way of the animal. If you want $40.00 for the colt, you may sign the acceptance blank I sent you on May 13th and return it to me and I will issue a voucher in your favor for the amount. Your proposition to have three disinterested parties place a value on the animal does not interest me, as I have made sufficient investigation to know that $40.00 is as much or more than you could have gotten for the colt in open market." (23).

On August 18, 1911, plaintiff brought suit against the defendant in a justice of peace court for the sum of $50.00 on account of killing the colt, and on August 31, 1911, judgment was rendered in his favor for $50.00 damages, $1.00 interest, the total amount to bear six per cent per annum, and for all costs (1-2). The defendant took an appeal to the circuit court; and, on motion,

plaintiff was permitted to amend his complaint by adding the following:

> "That said defendant wholly failed and refused to pay and settle for the killing of one pony mare for more than thirty days after demand had been made therefor.
>
> Wherefore, he prays for the statutory penalty provided by the Acts of 1907 of the Statutes of the State of Arkansas, page 61, and a reasonable attorney's fee.
>
> Wherefore, plaintiff prays judgment for double the value of the said pony mare, his attorney's fee, his cost, and other relief" (22, 28).

On a trial of the case in the circuit court, a verdict was returned in favor of the plaintiff for $50.00, omitting the one dollar interest which plaintiff had demanded and received in the justice of the peace court. Plaintiff filed a motion for judgment in double the amount of the verdict and for an attorney's fee, all of which was allowed by the court, the attorney's fee being fixed at $25.00 (5). Upon the trial plaintiff and his witnesses testified that the colt was worth $50.00 or $60.00 at the time it was killed and defendant's witnesses testified that it was worth $35.00 or $40.00 (9-25).

The statute of Arkansas which is drawn in question is found in the Acts of Arkansas of 1907, page 144, and is as follows:

> "Whenever any stock, such as horses, cows, hogs, sheep, etc., are killed, wounded or injured by railroad trains running in this State, the conductor or engineer on the train doing the damage shall cause the station master or overseer at the nearest station house to the killing or wounding to post within one week thereafter, and to keep posted for twenty days thereafter, a true and correct description of such stock as may have been so killed or wounded, at the nearest station house and nearest depot house, giving a true and correct description of the color, marks, brands and other natural description, that may assist in identifying such stock, and the time when and place where killed or wounded; and on failure to so advertise any stock so killed or wounded, the owner shall recover double damages for all stock killed and not advertised. And said railroad shall pay the owner of such stock within thirty days after notice is served on such railroad by such owner. Failure to do so shall entitle said owner to double the amount of damages awarded him by any jury trying such cause, and a reasonable attorney's fee.

> And provided further, that if the owner of such stock killed or wounded shall bring suit against such railroad after the thirty days have expired, and the jury trying such cause shall give such owner a less amount of damage than he sues for, then such owner shall recover only the amount given him by said jury and not be entitled to recover any attorney's fees."

An appeal was duly prosecuted to the Supreme Court of the State of Arkansas and the Supreme Court affirmed the judgment of the circuit court, holding that the Arkansas statute in question is valid and not in conflict with section 1 of the Fourteenth Amendment to the Constitution of the United States. The judgment and opinion of the Supreme Court of Arkansas are set out in the printed record (32-36). The defendant filed a petition for rehearing, again specifying, among other things, the invalidity of the Arkansas statute, as being in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, specifically setting out the statute of the State of Arkansas and calling the attention of the Supreme Court of Arkansas to the decisions in the cases of *Gulf, Colorado & Santa Fe R. R. Co.* v. *Ellis,* 165 U. S., 150, and *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Wynne,* 224 U. S., 354. The Supreme Court of Arkansas denied the petition for rehearing upon the authority of its decision in this case, *The Kansas City Southern Railway Company* v. *Anderson,* 104 Ark. 500, and thereupon the defendant sued out this writ of error.

SPECIFICATION OF ERRORS.

Omitting formal parts, the errors relied on are as follows (40-42):

I.

Because the Supreme Court of the State of Arkansas denied to the plaintiff in error, The Kansas City Southern Railway Company, a right, privilege and immunity granted to it by Section one of Amendment Fourteen of the Constitution of the United States.

II.

Because the Supreme Court of Arkansas has erroneously held and declared that the Supreme Court of the United States has not passed upon and adjudged the Act of Arkansas, approved February 27, 1907, void and of no effect.

III.

Because said Act of the State of Arkansas as construed by the Supreme Court of Arkansas takes the property of this plaintiff in error without due process of law in violation of Section one of the Fourteenth Amendment of the Constitution of the United States, and contrary to that section also, deprives this plaintiff in error of its property without due process of law, and denies to it the equal protection of the laws.

IV.

Because the Supreme Court of Arkansas in its decision and opinion in this cause denied to this plaintiff in error its rights and immunities arising and growng out of a proper construction of Section one of Article Fourteen of the Amendments to the Constitution of the United States.

V.

Because the Supreme Court of the State of Arkansas held the following act of the General Assembly of the State Arkansas to be a valid and binding law, which is as follows:

"Be it enacted by the General Assembly of the State of Arkansas:

Section 1. That Section 6774 of Kirby's Digest be amended to read as follows:

Section 6774. Whenever any stock, such as horses, cows, hogs, sheep, etc., are killed, wounded or injured by railroad trains running in this state, the conductor or engineer on the train doing the damage shall cause the station master or overseer at the nearest station house to the killing or wounding to post within one week thereafter, and to keep posted for twenty days thereafter, a true and correct description of such stock as may have been killed or wounded at the nearest station house and nearest depot house, giving a true and correct description of the color, marks brands and other natural description, that may assist in identifying such stock, and the time when and place where killed or wounded; and on failure to so advertise any stock so killed or wounded, the owner shall recover double damages for all stock killed and not advertised. And said railroad shall pay the owner of such stock within thirty days after notice is served on such railroad by such owner. Failure to do so shall entitle said owner to double the amount of damages awarded him by any jury trying such cause, and a reasonable attorney's fee.

And provided further, that if the owner of such stock killed or wounded shall bring suit against such railroad after the thirty days have expired, and the jury trying such cause shall give such owner a less amount of damage than he sues for, then such owner shall recover only the amount given him by said jury and not be entitled to recover any attorney's fees.

Section 2. That all laws and parts of laws in conflict are hereby repealed, and that this Act take effect and be in force from and after its passage.

Approved February 27, 1907."

VI.

The said Supreme Court of Arkansas, by its decision and opinion in this cause in upholding said Act as to the attorney's fee and also as to double damages, has deprived this plaintiff in error of its property without due process of law, and has denied to it the equal protection of the laws contrary to Section one of the Fourteenth Amendment to the Constitution of the United States.

VII.

The Supreme Court of Arkansas by its decision and opinion in upholding said Act of Arkansas as to the attorney's fee has deprived this plaintiff in error of its property without due process

of law, and has denied to this plaintiff in error the equal protection of the laws contrary to the said Section one of the Fourteenth Amendment of the Constitution of the United States. The said Act of Arkansas, and no other law of Arkansas, fixes against other persons and corporations similarly situated any such attorney's fee.

VIII.

The said Supreme Court of Arkansas by its decision and opinion in this cause upholds the double penalty clause of said Act of Arkansas, and thereby deprives this plaintiff in error of its property without due process of law, and denies to this plaintiff in error the equal protection of the laws contrary to said Section one of the Fourteenth Amendment of the Constitution of the United States. The said laws of the State of Arkansas do not fix against any other persons, or corporations or citizens of said State said double liability.

IX.

The said Supreme Court of Arkansas by its judgment and decision held that the defendant in error properly amended its complaint in the Circuit Court of Little River County, State of Arkansas, and said Supreme Court of Arkansas by holding that said amendment was properly made deprived this plaintiff in error of its property without due process of law, and denied it the equal protection of the laws contrary to Section one of the Fourteenth Amendment of the Constitution of the United States.

X.

The plaintiff in error respectfully shows that it has filed herein its petition for rehearing, and the same has been by the Supreme Court of Arkansas denied.

XI.

Because the Supreme Court of Arkansas erred in holding that the provisions of the Act of Arkansas heretofore set forth did not deprive this plaintiff in error of its property without due process of law, and did not deprive this plaintiff in error of the equal protection of the laws.

BRIEF.

I.

The record properly presents Federal questions which may be reviewed here on writ of error to the State Supreme Court.

This was an action to recover damages for the alleged negligent killing of a colt upon the railroad tracks of the defendant, together with double damages and an attorney's fee, as provided by Act 61 of the Acts of Arkansas of 1907, page 144. At every stage of the proceedings, as shown by the record, defendant properly saved the point that said act, as applied in this case, in allowing double damages and an attorney's fee, was in conflict with the Fourteenth Amendment of the Constitution of the United States as denying to the defendant due process of law, and the equal protection of the law. In the argument of the case before the Supreme Court of Arkansas, the attention of the court was also directed to the decision of this court in the case of *St. Louis, Iron Mountain & Southern Railway Company* v. *Wynne*, 224 U. S., 354, which case passed upon the Arkansas statute which is drawn in question here, and the contention was made that under this court's decision in the Wynne case the act was unconstitutional and void. The Supreme Court of Arkansas, in its opinion in the present case, *Kansas City Southern Railway Company* v. *Anderson*, (33-36) ruled adversely to defendant's contention that the said statute is in conflict with the Fourteenth Amendment of the Constitution of the United States, and also to the contention that the statute is void because of the decision of this court in the case of *St. Louis, Iron Mountain & Southern Railway Company* v. *Wynne, supra.* Subsequently, as shown by the record, a petition for rehearing, raising the above questions, was filed and overruled.

II.

The act of the State of Arkansas which is drawn in question in this case has been held unconstitutional by this court and is, therefore, void for all purposes.

This Arkansas act has already been considered by this court in the case of *St. Louis, Iron Mountain & Southern Railway Com-*

pany v. *Wynne*, 224 U. S. 354. This court, in that case, held that, where the owner of stock which had been killed by a railroad train served notice on the railway company demanding damages in the sum of $500, and, after the expiration of thirty days, the claim being unpaid, brought suit for $400.00 and in a trial before a jury recovered a verdict for $400.00, the statute, under such circumstances denied to defendant due process of law and was repugant to the Fourteenth Amendment of the Constitution of the United States.

The court, speaking by Mr. Justice Van Devanter, said:

> "We think the conclusion is unavoidable that the statute, as so construed and applied, is an arbitrary exercise of the powers of Government and violative of the fundamental rights embraced within the conception of due process of law. It does not merely provide a reasonable incentive for the prompt settlement without suit of just demands of a class admitting of special treatment by the Legislature as was the case with the statute considered in *Seaboard Air Line R. Co.* v. *Seegers*, 207 U. S. 73, 52 L. Ed., 108, 28 Sup. Ct. Rep., 28, but attaches onerous penalties to non-payment of extravagant demands, thereby making submission to them the preferable alternative. Thus, it takes property from one and gives it to another, not because of a breach by the owner of a duty to the latter or to the public, but because of a lawful exercise of an undoubted right. Plainly, this cannot be done consistently with due process of law."

In the argument of the case at bar before the Supreme Court of Arkansas it was contended that this Arkansas act had been held unconstitutional in the Wynne case, *supra*, and was, therefore, void. The Supreme Court of Arkansas, in disposing of the contention, says, in the case of *Kansas City Southern Railway Company* v. *Anderson*, 104 Ark., 500:

> "It is urged by counsel for appellant that the Supreme Court of the United States in that case (the Wynne case, *supra*) determined that this statute, as construed by this court, is violative of the provision of the Constitution inhibiting the taking of property without due process of law, and for that reason is invalid, and that the statute therefore is void, inasmuch as the construction placed thereon by this, the highest court of the state in which it was enacted, fixed its limitation and its application. But the Supreme Court of the United

States expressly refrained from passing on the constitutionality of this statute. In the opinion delivered, it said, 'In the brief for the railway company, the contention is advanced that the statute would still be wanting in due process of law were it construed as imposing double liability with an attorney's fee only where the prior demand is fully established in the suit following the refusal to pay; but that question does not necessarily arise upon the facts of this case, and we purposely refrain from considering it.' "

The Supreme Court of Arkansas then proceeds to state that it did not appear in the abstract and briefs submitted in the Wynne case that Wynne demanded larger damages than he subsequently sued for, and that it did not place upon the statute a construction that would make it applicable to a case where a demand had been made before suit for a sum greater than that recovered upon a trial, and consequently that its construction and application of the statute was not such as to render it invalid under the decisions of the Supreme Court of the United States.

We submit, however, that the words of the statute are clear, and that there is no proper basis for a construction of the statute, since, by its terms, it clearly permits that which was held unconstitutional in the Wynne case. The only way to remedy this statute is by legislation, for this reason:

The statute itself, by its terms, does not attach any significance to the amount demanded in the notice; in fact, it does not require that the owner shall specify any amount in his notice to the railway company. The test prescribed by the statute is whether the owner recovers before the jury the amount which he sues for, not the amount which he demanded in the notice which he served on the railway company.

It is impossible to say that the Legislature would amend the act by making the changes which this court declares are necessary in order that the act may be held constitutional.

> "Neither the court below nor this court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent."
>
> *Meyer* v. *Wells Fargo & Company*, 223 U. S., 298.

We realize that this question is complicated by the fact that this is a state statute and ordinarily the construction of such a statute by the Supreme Court of the state is accepted; but in the Wynne case the statute came to this court as authority for the imposition of a penalty and was held unconstitutional because it deprived the litigant of due process of law. The plain terms of the statute authorized the imposition of a penalty in such a case. We submit that this is not the same case as one where an act is attacked because of its unconstitutionality under a different state of facts than that which exists in the case in which it appears before this court. We submit that after the act has already been considered by this court under a state of facts that properly raises the question, and has been declared unconstitutional, it is void for all purposes.

This question is suggested but not decided in *Yazoo & Mississippi Valley R. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S., 217.

III.

The Arkansas act which is drawn in question in this case is in conflict with the Fourteenth Amendment to the Constitution of the United States.

1. *Because it denies to defendant the equal protection of the law.*

This involves the question whether the purpose of the portions of the act which are attacked in this case is one which furnishes a sound basis for singling out railroads and subjecting them to the payment of double damages and attorney's fees when litigants in general are not subjected to the same burden.

For convenience we again print the act in question, designating the portion which is here attacked as paragraph (b):

> (a) Whenever any stock, such as horses, cows, hogs, sheep, etc., are killed, wounded or injured by railroad trains running in this state, the conductor or engineer on the train doing the damage shall cause the station master or overseer at the nearest station house to the killing or wounding to post within one week thereafter, and to keep posted for twenty days thereafter a true and correct description of such stock as may have been so killed or wounded at the nearest station

house and nearest depot house; giving a true and correct description of the color, marks, brands and other natural description, that may assist in identifying such stock; and the time when and place where killed or wounded; and on failure to so advertise any stock so killed or wounded, the owner shall recover double damages for all stock so killed and not advertised. (b) And said railroad shall pay the owner of such stock within thirty days after notice is served on such railroad by such owner. Failure to do so shall entitle said owner to double the amount of damages awarded him by any jury trying such cause, and a reasonable attorney's fee.

And provided further, that if the owner of such stock killed or wounded shall bring suit against such railroad after the thirty days have expired, and the jury trying such cause shall give such owner a less amount of damage than he sues for, then such owner shall recover only the amount given him by said jury and not be entitled to recover any attorney's fees. Art. 6, Acts of Arkansas of 1907, p. 144.

What is the purpose of the above quoted provision?

Such legislation has been upheld in cases where a statute provides for double damages or an attorney's fee in case stock gets upon the railroad right-of-way and is killed or injured at points where the right-of-way can be but is not fenced, or where there is a statute affirmatively requiring the building of fences by a railroad company and such fences have not been built or kept in repair. The Supreme Court of Arkansas, in the case of *St. Louis, Iron Mountain & Southern Railway Company* v. *Wynne*, 90 Ark., 538, 219 S. W. 1127, in discussing the statute under consideration, cites the case of *Minneapolis & St. Louis Railway Company* v. *Beckwith*, 129 U. S., 26. In that case this court upheld a statute of Iowa, which provided that a railroad corporation which fails to fence its right-of-way against live stock at all points where such right to fence exists, shall be liable to double damages unless it pays the value of stock injured or killed by reason of the want of such fence, within thirty days after receipt of notice in writing. The case of *Missouri Pacific Railway Company* v. *Humes*, 115 U. S. 512. involves a similar statute.

Can this Arkansas statute be upheld as a statute whose purpose it is to provide a penalty for the failure to fence the railroad right-of-way?

The statute is evidently not so intended, for the reason that the penalties apply whether the stock is killed at points where the right-of-way may be fenced, or at points, such as public highways and station grounds, at which the right-of-way cannot be fenced: the penalty also would apply whether the railroad had fenced its right-of-way and kept the fence in good condition or not.

This conclusion that the statute was not passed with any such purpose in view is further confirmed by a consideration of the statutes and decisions of Arkansas.

Paragraph (a) of the act which is under consideration in this case was a part of the act of February 3, 1875. See Section 6744, Kirby's Digest of the Statutes of Arkansas. Paragraph (b), the portion of the act which is attacked herein, was added by an act of February 27, 1907, Act 61, Acts of Arkansas 1907, p. 144. The act of February 3, 1875, in addition to the provision of paragraph (a), that railroads shall post a notice of stock killed (and provisions covering venue of suits, arbitration, parties who should sue in case of injuries to persons, etc.; see generally, sections 6773-6776 and 6779-6782 Kirby's Digest of the Statutes of Arkansas) provided, (section 6782 of Kirby's Digest):

> "If any section boss or master, hand or other person employed by any railroad company owning and operating any railroad in this state, or any other person connected with any railroad in this state, shall be caught mutilating, disfiguring, burning, hauling off or burying any dead carcass that shall be killed on any railroad in this state, without first notifying at least two citizens of the neighborhood, whose duty it shall be to take and preserve all marks, flesh or ear or otherwise, or value of such animal, brute, swine or other stock, shall be deemed guilty of a misdemeanor and be fined in any sum not less than twenty-five dollars nor more than five hundred dollars, for such offence."

The court, in sustaining the above section, says, in *Bannon* v. *State*, 49 Ark., 167, 4 S. W. 655:

> "* * * The provision is taken from the act of February 3, 1875, requiring railroad companies to pay for damages to persons and property caused by the running of its trains. One of the main objects of the act is to secure the citizens living in the neighborhood of the lines of railways in the recovery of damages against the companies for negligently

killing their stock. *The obligation to fence the track was not imposed upon the companies, as it has generally been elsewhere, but they are required to furnish the stock-owner with facilities for ascertaining that his stock has been injured, and the opportunity of identifying it afterwards.* This is done by making it incumbent on the company to post a notice at the station-house nearest to the place of the injury, giving a description of the animal injured, with a statement of the time and place of the injury; and, further, by a compliance with the requirements of the provision in question. The power of the legislature to impose upon railroad companies the obligation of affording the stock-owner every reasonable facility for obtaining the evidence of the injury he has sustained by the running of their trains, and of enforcing the performance of the duty by prescribing a punishment for its neglect, cannot be doubted. * * *

The provision in question is of a piece with the double-damage feature of the act, (the double damage feature referred to here is what was have designated as paragraph (a), providing that the railroad shall post notices of all stock killed) and was designed to stimulate the companies' servants to perpetuate the evidence of the injuries done through the acts of themselves or their co-employes, and the punishment that is prescribed against them is intended simply to compel an enforcement of the statutory duty in aid of the stockowner."

The case of *Missouri & North Arkansas Railroad Company* v. *State*, 92 Ark. 1, 121 S. W., 930, also shows that the act attacked in this case is not a fencing statute, it being the policy of the Legislature to specifically provide for fencing by special statutes where it is required. In the last mentioned case, the railroad company was prosecuted on account of failure to keep in repair a fence in accordance with an act requiring the fencing of its right-of-way in Carroll, Boone, and Searcy Counties, in the State of Arkansas. The company contended that it was denied the equal protection of the law in being required to fence when other railroad companies in the state were not required to do so.

The court says:

"* * * It is insisted that the statute singles out one line of railroad, and imposes upon the owner of it the unequal burden of fencing the track when similar burdens are not placed on other railroad companies."

After discussing the principles as to classification announced in *Railway Company* v. *Ellis*, 165 U. S. 150, and *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79, the court continues:

> "* * * The statute now under consideration falls within a different principle. It is a special act, applicable to a given locality; that is to say, to a particular line of railroad running through a certain locality. It is purely local in its operation. The selection of this line of railroad is necessarily the selection of a given territory over which the statute is to operate, and it implies a determination by the lawmakers of the question of necessity for such provisions as a protection to the property along that particular route. Now, the Constitution of this state permits special legislation when general laws cannot be made applicable, and this court has repeatedly held that the Legislature is the sole judge of the necessity for a special statute.
>
> * * * The only complaint is that this conpany should not be singled out and compelled to do that which other railroad companies in the state are not required to do. The answer which we make to the contention is that the Legislature has determined, it is presumed after due investigation, that the conditions are such along the route of this railroad that the track should be fenced in a particular manner pointed out in the statute for the protection of live stock, and, maybe, for the better security of human life, in the operation of trains. The particular reasons which prompted the Legislature in arriving at this decision we are not called upon to inquire into. The fact that there are other railroads in that portion of the state, and that another railroad traverses one of the counties memtioned in the statute, does not stamp the enactment as an arbitrary classification. Different conditions, calling for different regulations, may exist in the same county, and as we have already said, the Legislature alone can inquire into and determine the necessity of putting into force a police regulation in a given locality."

Among the penalties provided for non-compliance with this *fencing statute*, is the familiar penalty of double damages in case the fence is not kept in good repair, and stock is killed or injured. See section 4 of the Act (Act 165, Acts of Arkansas of 1905, p. 410) which reads as follows:

> "That said company shall keep the fences and stock guards in good repair, and when in such good condition they shall

> not be liable for any mule, horse, cow, hog, sheep or goat killed or injured on the tracks so fenced, but if any such stock is killed or injured on the tracks when the fence is not in good condition on account of the negligence of the railroad company, the company shall be liable for damages in double the value of the animal so killed or injured."

There was formerly in effect a provision for the *compulsory* arbitration of claims for live stock killed or injured by railroad trains. This arbitration statute is set out in full in the case of *St. Louis, Iron Mountain & Southern Railway Company*. v. *Williams*, 49 Ark. 492, 5 S. W. 883. Briefly stated, this arbitration statute provided that when any stock was killed or injured by a railroad train, either party might demand an appraisement, and if the person or company operating the railroad should pay the amount assessed as damages, within thirty days after the appraisement was made, they should be released from further liability. In case of suit after arbitration, attorney's fees were allowed under certain circumstances to the person or company operating the railroad, and in certain other cases to the owner of the stock.

The court, in holding the above arbitration statute unconstitutional, said:

> "What is the object of imposing these penalties? All statutory penalties are imposed for the purpose of enforcing the object or design of the statute or acts imposing them. The imposition of a penalty for doing an act is equivalent to prohibiting it; and for failing to do it, to requiring it to be done. It is obvious, therefore, that the object and effect of the act in question is to require both parties to abide by the award of the board and to deter them from going into the courts to have their rights and liabilities determined and thereby secure, as suggested by the title of the act, 'the speedy settlement of claims for stock killed or injured by railroads.'"

In discussing the last mentioned Arkansas Act, the Supreme Court of Tennessee, in the case of *Illinois Central Railroad Company* v. *Crider*, 91 Tenn., 489, 19 S. W., 618, in upholding a statute of Tennessee, putting certain duties and liabilities on railroads with reference to stock killed or injured upon or near their unfenced tracks, distinguishes the Arkansas statute last discussed as follows:

> "The (Arkansas) act was not one intended to compel the fencing of railroads and was purely an effort to compel submission to an award."

Subsequently an act providing for voluntary arbitration was passed and appears as a part of this act of February 3, 1875, as amended; see Kirby's Digest of the Statutes of Arkansas, Section 6777-6778. Later, by act approved February 26, 1907, Act. 61, Acts of Arkansas of 1907, page 144, what we have designated as paragraph (b) of the act which is under consideration in this case was added to paragraph (a). We submit that the purpose of paragraph (b) is practically the same as the purpose of the compulsory arbitration provision which was held unconstitutional in the case of *St. Louis, Iron Mountain & Southern Railway Company* v. *Williams, supra*; that is, to force the settlement of claims without suit.

We take it that this court will take judicial notice of the fact that there is no statute in Arkansas requiring railroad right of way to be fenced in Little River County, the county in which the present cause of action arose, and that, as shown by the above decisions, it is the policy of the Legislature of Arkansas to pass special acts covering such fencing as is required. Attention may also be called to the following fencing statutes: the quarantine law requiring fencing of railroad right of way through the northernmost two tiers of counties in the state. See section 7907 of Kirby's Digest, and section 14 of Act 409 of the Acts of Arkansas for 1907, page 1048. Little River County is in the southwestern corner of the state.

See also, Act 208, Acts of Arkansas for 1909, page 615, and Act 67 of Acts of Arkansas of 1911, page 45, requiring railroad rights of way to be fenced in Fulton, Sharp, Lawrence, and Polk Counties; also Act 64 of Acts of Arkansas of 1907, page 151, providing for the levying of a tax, etc., in order to build a fence on the northerly side of a railroad right-of-way, and providing that the railroad property shall be included in the property to be taxed.

Outside of the citation of cases, the only indication by the Supreme Court of Arkansas, in the case of *St. Louis, Iron Mountain & Southern Railway Company* v. *Wynne*, 90 Ark., 538, 119

S. W., 1127, of the purpose and reason for the act which is drawn in question here, is the following:

> * * * Carriers by rail are, in the operation of trains, engaged in a work which is hazardous to stock running at large, but are only responsible for damage to stock when the damage is caused by negligence of their servants. It is a matter of common knowledge that in this state, where a considerable portion of the lands are unfenced and afford free range for live stock, it is customary to permit stock to run at large, It is therefore no unreasonable burden to require carriers, in cases where they are legally responsible for damage done to stock in the operation of trains, to pay the damages within a reasonable time prescribed by law. Frequently, the injury to live stock occurs at obscure places on the railroad when the trainmen are the only witnesses, and the evidence of negligence or non-negligence lies exclusively with them. The company, when notified of the damage, can readily investigate and ascertain whether or not it is responsible for the damage, and it is no hardship to require this to be done promptly. Thirty days, the time prescribed by this statute within which the railroad company is required to pay, is reasonable, for it affords sufficient time for investigation of a claim for damages before being required to pay. A wholesome feature of this statute, which should not be overlooked in considering the question of its reasonableness, is that double damages cannot be recovered where the verdict of a jury assessing the amount of damage is less than the amount sued for, thus putting a check on extravagant and unwarranted claims being made. We are of the opinion that the statute is valid.

We submit that, in what is said in the above quotation, the only unusual condition distinguishing these claims from other claims is that cattle may be injured at obscure points and the owner may have difficulty in securing evidence of his loss. Practically the same idea is expressed in the case of *Bannon* v. *State*, *supra*. This situation is fully covered by the provision that notice of the killing or injury of stock, with a description of the stock, shall be posted, and that a record of the marks and other particulars regarding the animal shall be made by two citizens of the neighborhood before the animal shall be mutilated or disposed of. The penalty for non-payment, which is attacked in the case at bar is of no assistance in meeting the above condition, since there is no liability to such penalty until the owner has discovered his loss and

served notice of the killing or injuring of the stock on the railroad company.

We therefore submit that the portion of the act which is under consideration in this case simply provides a penalty for non-payment of a debt within a certain time.

A similar act, of the State of Texas, was under consideration by this court in the case of *Gulf, Colorado & Santa Fe Railway Company* v. *Ellis,* 165 U. S., 150. That case also involved a claim for stock killed on a railroad, and the Texas Act was held unconstitutional as denying to the defendant the equal protection of the law.

Portions of the Texas Act and Arkansas Act are printed for purposes of comparison:

TEXAS ACT.

* * * any person in this state having a valid *bona fide* claim for personal services rendered or labor done or for damages or for overcharges on freight or claims for stock killed or injured by the train of any railroad company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, and the amount of such claim does not exceed $50.00, may present the same, verified by his affidavit, and if at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court and if he shall finally establish his claim and obtain judgment for the full amount thereof as presented for payment to such corporation in such court or

ARKANSAS ACT.

* * * And said railroad shall pay the owner of such stock within thirty days after notice is served on such railroad by such owner. Failure to do so shall entitle said owner to double the amount of damages awarded him by any jury trying such cause, and a reasonable attorney's fee.

And provided further, that if the owner of such stock killed or wounded shall bring suit against such railroad after thirty days have expired, and the jury trying such cause shall give such owner a less amount of damage than we sues for, then such owner shall recover only the amount given him by said jury and not be entitled to recover any attorney's fees.

any court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto, all reasonable attorney's fees, provided he has an attorney employed in his case, not to exceed $10.00 to be assessed and awarded by the court or jury trying the issue.

In holding the Texas Act unconstitutional, the court said, on p. 151:

> "The supreme court of the state considered this statute as a whole and held it valid, and as such it is presented to us for consideration. Considered as such, it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in their favor, they recover no attorneys' fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorneys' fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

In discussing principles of classification, and the question whether such a classification was made in the Texas act as was necessary to comply with the constitution, the court says, in part, on p. 157:

> "* * * Further, the penalty is imposed, not upon all corporations charged with the *quasi*-public duty of transportation, but only upon those charged with a particular form of that duty. So, the classification is not based on any idea of

special privileges by way of incorporation, nor for special privileges given thereby for purposes of private gain, nor even of such privileges granted for the discharge of one general class of public duties.

But if the classification is not based upon the idea of special privileges, can it be sustained upon the basis of the business in which the corporations to be punished are engaged? That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. Any classification for the imposition of such special duties—duties arising out of the peculiar business in which they are engaged —is a just classification, and not one within the prohibition of the 14th Amendment. Thus, it is frequently required that they fence their tracks, and as a penalty for a failure to fence, double damages in case of loss are inflicted. *Missouri P. R. Co.* v. *Humes,* 115 U. S., 512 (29:463). But this and all kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged—a duty not resting upon others; a duty which can be enforced by the legislature in any proper manner; and whether it enforces it by penalties in the way of fines coming to the state, or by double damages to a party injured, is immaterial. It is all done in the exercise of the police power of the state and with a view to enforce just and reasonable police regulations.

While this action is for stock killed, the recovery of attorneys' fees cannot be sustained upon the theory just suggested. There is no fence law in Texas. The legislature of the state has not deemed it necessary for the protection of life or property to require railroads to fence their tracks, and as no duty is imposed, there can be no penalty for non-performance. Indeed, the statute does not proceed upon any such theory; it is broader in its scope. Its object is to compel the payment of the several classes of debts named, and was so regarded by the supreme court of the state.

But a mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while in certain cases there

> may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation."

We submit that the case at bar is ruled by the Ellis case.

Various classes of cases have been distinguished from the Ellis case, but we do not understand that the fundamental principles of that case have been departed from, or their soundness questioned. Indeed, we do not see how they can be.

To cite one late case, the Ellis case is relied upon in *Southern Railroad Company* v. *Greene*, 216 U. S. 400, in which the court says:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 155, 165; 41 L. Ed. 666, 668, 671, 17 Sup. Ct. Rep. 255; *Cotting* v. *Kansas City Stock Yards Co.* (*Cotting* v. *Godard*) 183 U. S., 79, 46 L. Ed. 92, 22 Sup. Ct. Rep. 30; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 559, 46 L. Ed. 679, 689, 22 Sup. Ct. Rep, 431.

Does the case at bar fall within the principle of any of the cases which have been distinguished from the Ellis case?

The cases in which penalties and double damages have been allowed are cases where some duty is required under well recognized subjects of special regulation, a penalty being imposed for the non-performance of the duty, not for the mere non-payment of a debt, which it is the duty of all debtors to pay promptly. Some of the cases also involve the power of a state to alter, amend, or repeal the charters of corporations organized under its laws, or to impose conditions upon foreign corporations which the state has power to exclude entirely.

As The Kansas City Southern is a corporation organized under the laws of the State of Missouri and engaged in interstate commerce in the State of Arkansas, the reasons on which some of these cases have been upheld would not be applicable to it.

The cases of *Seaboard Air Line Railway Company* v. *Seegers*, 207 U. S. 73; *Atlantic Coast Line Railroad Company* v. *Mazursky*, 216 U. S. 122; and *Yazoo & Mississippi Valley Railroad Company* v. *Jackson Vinegar Company*, 226 U. S. 217, involve statutes affecting all common carriers. The court specifically states that the penalty provided in those statutes is not a penalty for the non-payment of a debt, but is a regulation of the peculiar relation between shippers and common carriers growing directly out of the performance of the duty of a common carrier of freight.

The cases of *Missouri Pacific Railway Company* v. *Humes*, 115 U. S. 512; *Minneapolis, etc. Ry. Co.* v. *Beckwith*, 129 U. S. 26, and *A. T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, are familiar examples of the class of cases which uphold statutes prescribing a penalty for failure to fence against live stock or to take proper precautions against the setting out of fires.

The cases penalizing insurance companies for failure to pay insurance money promptly involve a peculiar class of contracts where prompt payment is one of the main considerations of the contract and of great importance. There was also involved the right of a state to prescribe the conditions under which its own and foreign insurance corporations may do business within the state. *Fidelity Mutual Life Association* v. *Mettler*, 185 U. S. 308.

We have, we think, shown that the act under consideration is simply an act to compel the payment of a debt without resort to the courts, just as the Supreme Court of Arkansas, in *St. Louis, Iron Mountain & Southern Railway Company* v. *Williams*, 49 Ark. 492, held an act providing a penalty for failure to pay an arbitration award to be. The act requires the performance of no other duty. It is obviously not a fencing statute, fencing being the recognized and practical way of keeping stock off of railroad tracks. Furthermore, the Legislature of Arkansas has, in effect, said that the general situation does not yet require or justify legislation providing that railroad rights of way shall be fenced in Little River County, the county in which this cause of action arose.

Other provisions of the Act of Feb. 3, 1875, require the posting of notices of the killing of live stock and the preservation by disinterested persons of a description of the stock, etc., before the dead carcasses are mutilated or disposed of. Those provisions are

supported by independent and separate penalties and require no aid from the portions of the act which are under consideration in this case.

We submit that this is simply a statute for the purpose of compelling the speedy payment of unliquidated demands without resort to the courts. There is no common carrier relation between the railroad and the owners of this live stock; nor any other condition disclosed which justifies placing either the owners of the live stock or the railroads in a special class, separate and apart from the remainder of the community. As stated in *Gulf, Colorado & Santa Fe R. R. Co.* v. *Ellis*, 165 U. S., on p. 158:

> "But a mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation."

See also *Connolly* v. *Union Sewer Pipe Company*, 184 U. S., 540.

2. *This Arkansas Act denies to defendant due process of law.*

In this case, the plaintiff served notice of the killing of his stock on the Railway Company's agent about April 29th. (12) The claim agent, on May 13th, (28) in about half the time prescribed by the statute, replied, offering to pay $40.00. This letter of the claim agent was not put in evidence, but the claim agent's reason for making the offer is stated in his letter of June 1st, which is as follows:

> "I have yours of May 15th, 1911, in which you refuse my offer of $40.00 for your colt killed April 29, 1911, on mile 464. This is all I can see my way to offer you on this claim, and I made this offer strictly on a compromise basis, as we do not admit that we are at all responsible for killing the colt as it ran into the side of the engine and our engineer could not get out of the way of the animal. If you want $40.00 for the colt you may sign the acceptance blank I sent

you on May 13 and return it to me and I will issue a voucher in your favor for the amount. Your proposition to have three disinterested parties place a value on the animal does not interest me, as I have made sufficient investigation to know that $40.00 is as much or more than you could have gotten for the colt in open market." (23)

At the trial the witnesses fixed the value of the colt at from $35.00 or $40.00, to $50.00 or $60.00. (9-25)

The testimony shows that the witnesses who fixed the lower values for the animal were not without reasonable grounds for their estimates. It appeared, for instance, that the owner, a few months previously, had purchased the colt, together with a mule, paying $75.00 for the two, the mule being regarded as the more valuable. (13, 14) It also appeared that the colt was considerably undersized, and consequently not worth the price ordinarily commanded by those of its age. (21) As appears from the letter, also, there was a question as to liability.

Assuming that the offer of $40.00 was made in entire good faith, and we submit that the claim agent's letter, and the evidence in the case demonstrate this, here was a claim put in at $50.00, for a colt which the claim agent's investigation had convinced him was worth only $40.00. Must a railroad company in all such cases pay the amount demanded, since it is obvious that it cannot afford to run the risk of being held liable to double damages and an attorney's fee in the event that suit is brought? In the case at bar, the amount of the demand was $50.00; the judgment is for $125.00. Clearly, a railroad company must pay practically all claims, no matter how unfair and excessive, if it must suffer such a penalty in case its judgment is wrong as to what amount a jury may award. Such legislation is a direct encouragement to the growth of exorbitant demands, since the owner of the stock knows that the railroad company must pay the amount he demands, or run the risk of paying double the amount and an attorney's fee, while, if his demand is not allowed, he will suffer no penalty and will receive the full value of his stock.

It will be noted that the penalty has grown from an attorney's fee of not exceeding $10.00 on claims of not more than $50.00, in

the Ellis case, to double damages and an attorney's fee, no matter what the amount of the claim may be. In the Wynne case the claim was for $400.00 and claims for that amount are not unusual. What is the purpose of allowing both double damages, and an attorney's fee? We submit that the penalty is so excessive as to fall within the condemnation of the cases of *Ex parte Young*, 209 U. S. 123; *Missouri Pacific Railway Company* v. *Tucker*, 230 U. S. 340; and similar cases.

As we have already pointed out, this law is neither by design nor in its operation an aid to some other law passed by the state in a valid exercise of its police power; it simply penalizes a carrier for an unsuccessful resort to the courts in an effort to defeat a claim, although a *bona fide* investigation has convinced it that the claim has no merit from a legal standpoint, or is exorbitant in amount.

What we wish to urge as earnestly as we can, is that such a law denies to the railroad company the right of recourse to the courts even in case it acts in entire good faith, makes its offer to the owner within thirty days after receipt of the notice, and, after careful investigation, honestly believes that it has offered every cent the stock is worth. Such a law may be all right in some cases where the demand is liquidated, so that the exact amount due can be ascertained, but no one can guess exactly what amount, in case of a suit for unliquidated damages, will be recovered, *Chicago, Milwaukee & St. Paul Railway Co.* v. *Polt*, 34 Sup. Ct. Rep., 301, decided January 26, 1914. A ridiculously low offer would, of course, indicate bad faith; but on the evidence in this case we feel confident that the court will agree that there is no indication of bad faith.

We submit that the whole theory of this law is wrong. Even if this were a proper subject of special legislation, which we deny, we submit that all that the law could properly require was done. Prompt reply was made within the time limited by the statute, and an honest offer of settlement was made. Such legislation should, in no event, go further than to provide a reasonable penalty in the event of the failure to make a *bona fide* attempt at settlement within a reasonable time; that is, a penalty should be allowed only when

the court finds that the matter was allowed to go to suit simply for the purpose of vexation or delay.

It is respectfully submitted that the case should be reversed.

Respectfully submitted,

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